

**United States Circuit Court
of Appeals**
For the Ninth Circuit

RELIANCE CONSTRUCTION COMPANY, a corporation; CITY OF HOOD RIVER, a municipal corporation, and NATIONAL SURETY COMPANY, a corporation,

Appellants,

vs.

HASSAM PAVING COMPANY, a corporation, and OREGON HASSAM PAVING COMPANY, a corporation,

Appellees.

TRANSCRIPT OF RECORD

On Appeal from the District Court of the United States for the District of Oregon.

Filed

JUL 31 1917

F. D. Monckton,
Clerk.

No. _____

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of Appeals
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*United States Circuit Court of Appeals for the
Ninth Circuit.*

RELIANCE CONSTRUCTION COMPANY, a
corporation; CITY OF HOOD RIVER, a muni-
cipal corporation, and NATIONAL SURETY
COMPANY, a corporation,

Appellants,

vs.

HASSAM PAVING COMPANY, a corporation,
and OREGON HASSAM PAVING COMPANY,
a corporation,

Appellees.

NAMES AND ADDRESSES OF THE
ATTORNEYS OF RECORD:

Ralph R. Duniway, Chamber of Commerce Build-
ing, Portland, Oregon, for the Appellants.

Carey & Kerr, Yeon Building, Portland, Oregon, for
Appellees.

*In the District Court of the United States for the
District of Oregon.*

In Equity.

HASSAM PAVING COMPANY, a corporation, and
OREGON HASSAM PAVING COMPANY, a
corporation,

Plaintiffs,

vs.

RELIANCE CONSTRUCTION COMPANY, a cor-
poration; CITY OF HOOD RIVER, a municipal
corporation, and NATIONAL SURETY COM-
PANY, a corporation,

Defendants.

No. 5966. CITATION.

United States of America to Hassam Paving Com-
pany, a corporation, and Oregon Hassam Pav-
ing Company, a corporation, and Carey & Kerr,
their attorneys;

Greeting:

You are hereby notified that in a certain case in
equity in the United States District Court in and
for the District of Oregon, wherein the Hassam Pav-
ing Company, a corporation, and Oregon Hassam

Paving Company, a corporation, are complainants, and Reliance Construction Company, a corporation; City of Hood River, a municipal corporation, and National Surety Company, a corporation, are defendants, an appeal has been allowed the defendant Reliance Construction Company therein to the Circuit Court of Appeals for the Ninth Circuit, you are hereby cited and admonished to be and appear in said court at San Francisco, California, thirty days after date of this citation to show cause, if any there be, why the order and decree appealed from would not be corrected, and speedy justice done the parties in that behalf.

Witness the Hon. Chas. E. Wolverton, Judge of the United States District Court for the District of Oregon, this 31st day of March, A. D. 1917.

CHAS. E. WOLVERTON,
Judge of the District Court of the United States for
Oregon District.

Due and legal service of the within citation is hereby accepted in Multnomah County, Oregon, this
day of , 1917, by receiving a copy thereof, duly certified to as such by Ralph R. Duniway, attorney for appellants, Reliance Construction Company.

CAREY & KERR,
Attorneys for Appellees

Filed March 31st, 1917.

G. H. MARSH, Clerk.

*In the District Court of the United States for the
District of Oregon.*

In Equity.

HASSAM PAVING COMPANY, a corporation, and
OREGON HASSAM PAVING COMPANY, a
corporation,

Plaintiffs,

vs.

RELIANCE CONSTRUCTION COMPANY, a cor-
poration; CITY OF HOOD RIVER, a municipal
corporation, and NATIONAL SURETY COM-
PANY, a corporation,

Defendants.

No. 5966. CITATION.

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poration; City of Hood River, a municipal corpora-
tion; and National Surety Company, a corporation,
are defendants, an appeal has been allowed the
defendant National Surety Company therein to the
Circuit Court of Appeals for the Ninth Circuit, you

are hereby cited and admonished to be and appear in said court at San Francisco, California, thirty days after date of this citation to show cause, if any there be, why the order and decree appealed from should not be corrected, and speedy justice done the parties in that behalf.

Witness the Hon. Chas. E. Wolverton, Judge of the United States District Court for the District of Oregon, this 31st day of March, A. D. 1917.

CHAS. E. WOLVERTON,
Judge of the District Court of the United States
for Oregon District.

Due and legal service of the within citation is hereby accepted in Multnomah County, Oregon, this
day of , 1917, by receiving a copy thereof, duly certified to as such by Ralph R. Duniway, attorney for City of Hood River, appellants.

CAREY & KERR,
Attorneys for Appellees.

Filed March 31st, 1917.

G. H. MARSH, Clerk.

*In the District Court of the United States for the
District of Oregon.*

In Equity.

HASSAM PAVING COMPANY, a corporation, and
OREGON HASSAM PAVING COMPANY, a
corporation,

Plaintiffs,

vs.

RELIANCE CONSTRUCTION COMPANY, a cor-
poration; CITY OF HOOD RIVER, a municipal
corporation, and NATIONAL SURETY COM-
PANY, a corporation,

Defendants.

No. 5966. CITATION.

United States of America to Hassam Paving Com-
pany, a corporation, and Oregon Hassam Pav-
ing Company, a corporation, and Carey & Kerr,
their attorneys;

Greeting:

You are hereby notified that in a certain case
in equity in the United States District Court in
and for the District of Oregon, wherein the Hassam
Paving Company, a corporation, and Oregon Has-
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poration; City of Hood River, a municipal corpora-
tion; and National Surety Company, a corporation,
are defendants, an appeal has been allowed the
defendant City of Hood River therein to the Circuit
Court of Appeals for the Ninth Circuit, you are

hereby cited and admonished to be and appear in said court at San Francisco, California, thirty days after date of this citation to show cause, if any there be, why the order and decree appealed from should not be corrected, and speedy justice done the parties in that behalf.

Witness the Hon. Chas. E. Wolverton, Judge of the United States District Court for the District of Oregon this 31st, day of March, A. D. 1917.

CHAS. E. WOLVERTON,
Judge of the District Court of the United States
for Oregon District.

Due and legal service of the within citation is hereby accepted in Multnomah County, Oregon, this
day of , 1917, by receiving a copy thereof, duly certified to as such by Ralph R. Duniway, attorney for appellants National Surety Company.

CAREY & KERR,
Attorneys for Appellees.
Filed March 31st, 1917.

G. H. MARSH, Clerk.

*In the District Court of the United States for the
District of Oregon.*

MARCH TERM, 1913.

BE IT REMEMBERED, that on the 1st day of May, 1913, there was duly filed in the District Court of the United States for the District of Oregon, a Bill of Complaint, in words and figures as follows, to wit:

*In the District Court of the United States for the
District of Oregon.*

In Equity.

HASSAM PAVING COMPANY, a corporation, and
OREGON HASSAM PAVING COMPANY, a
corporation,

Complainants,

vs.

RELIANCE CONSTRUCTION COMPANY, a cor-
poration; CITY OF HOOD RIVER, a municipal
corporation, and NATIONAL SURETY COM-
PANY, a corporation,

Defendants.

BILL OF COMPLAINT.

To the Judges of the District Court of the United
States for the District of Oregon:

Hassam Paving Company, a corporation duly
created and existing under the laws of the Com-
monwealth of Massachusetts and having its prin-
cipal place of business in the City of Worcester,
County of Worcester, in said commonwealth, a
citizen of the State of Massachusetts: and Oregon
Hassam Paving Company, a corporation duly cre-
ated and existing under the laws of the State of
Oregon and having its principal place of business
in the City of Portland, County of Multnomah, in
said state, a citizen of the State of Oregon, bring
this their bill of complaint against Reliance Con-
struction Company, a corporation organized and
existing under the laws of the State of Oregon, a

citizen of the State of Oregon and a resident and inhabitant of the City of Portland, County of Multnomah, in said State of Oregon; City of Hood River, a municipal corporation organized and existing under the laws of the State of Oregon, a citizen of the State of Oregon and a resident and inhabitant of said state; and National Surety Company, a corporation organized and existing under the laws of the State of New York, having its principal office in the City of New York in said state, and a citizen of New York and a resident and inhabitant of the State of New York.

And thereupon your orators complain and say:

I.

That the Hassam Paving Company at all the times hereinafter mentioned was and still is a corporation duly created and existing under the laws of the State of Massachusetts, and having its principal place of business in the City of Worcester, County of Worcester, in said commonwealth; that at all said times your orator, the Oregon Hassam Paving Company, was and still is a corporation duly created and existing under the laws of the State of Oregon and having its principal place of business in the City of Portland, County of Multnomah, in said state; that the defendant Reliance Construction Company at all said times was and still is a corporation duly created and existing under the laws of the State of Oregon and a resident of the said state; that the defendant City of

Hood River at all said times was and still is a municipal corporation duly created and existing under the laws of the State of Oregon and a resident of said state; and the defendant National Surety Company was at all of said times and still is a corporation duly created and existing under the laws of the State of New York and a resident of the State of New York, but having an office and engaged in business within the State of Oregon.

II.

That heretofore, to wit, prior to the 7th day of June, 1905, one Walter E. Hassam, being then a citizen of the United States, residing at the said City of Worcester, in the County of Worcester, in the State of Massachusetts, was the sole, original and first inventor of a certain new and useful invention entitled "Pavement and Process of Laying the Same," a more particular description of which will be found in the letters patent issued therefor by the Government of the United States, hereinafter referred to, and to which special reference is hereby made.

III.

That the said Pavement and Process of Laying the Same was a new and useful invention which was neither known nor used by others in this country before the invention and discovery thereof by the said Hassam, and which was never patented nor described in any printed publication in this or any foreign country before the invention and dis-

covery thereof by the said Hassam, or more than two years before his application for United States letters patent therefor, and at the time of his application for United States letters patent therefor, as hereinafter alleged, the same had not been in public use or on sale in the United States for more than two years, and was not patented or caused to be patented by him, or by his legal representatives or assigns, in any foreign country upon an application which was filed more than twelve months prior to the filing of his said application in this country, nor had the same been abandoned by him.

IV.

And your orators further show unto your honors that the said Hassam, being, as aforesaid, the original and first inventor of said Paving and Process of Laying the Same, did on the said 7th day of June, 1905, duly and regularly file in the patent office of the United States an application in writing, praying for the granting and issuance to him of letters patent of the United States for the same; that prior to the granting and issuing of any patent therefor, the said Hassam, for value received, did, by an instrument in writing under his hand and seal, duly witnessed and executed, sell, assign and transfer unto one Charles K. Pevey of Worcester, County of Worcester, State of Massachusetts, an undivided one-half interest in and to the said invention, and in and by said assignment did request the Commissioner of Patents to issue

such patent as might be granted upon such application, to the said Walter E. Hassam and Charles K. Pevey, jointly, which assignment in writing was filed and recorded in the patent office of the United States prior to the granting and issuance of any patent for said invention; and your orators pray that the said instrument in writing may be deemed and taken as part of this bill, and to the original or to a duly authenticated copy thereof now in your orators' possession and in court to be produced, your orators pray leave to refer.

V.

And your orators further show unto your honors that after proceedings duly and regularly had and taken in the matter of said application, to wit, on May 1st, 1906, letters patent of the United States, bearing date on that day and numbered 819,652, were granted, issued and delivered by the Government of the United States to said Walter E. Hassam and Charles K. Pevey, jointly, whereby there was granted to them, their heirs or assigns, for the term of seventeen years from the 1st day of May, 1906, the sole and exclusive right, liberty and privilege to make, use and vend the said invention throughout the United States of America and the territories thereof.

VI.

And your orators further show unto your honors that said letters patent of the United States were issued in due form of law in the name of the

United States under the seal of the patent office of the United States, signed by the Commissioner of Patents of the United States, and prior to the issuance thereof, all proceedings were had and taken which were required by law to be had and taken prior to the issuance of letters patent for new and useful inventions; and said letters patent, or a duly authenticated copy thereof, are ready in court to be produced by your orators, and which are hereby referred to and by such reference made a part hereof.

VII.

And your orators further show unto your honors that before the infringement hereinafter complained of, said Walter E. Hassam and said Charles K. Pevey, by an instrument in writing, duly signed, sealed and delivered by them, and recorded in the United States patent office, did sell, assign and transfer to your orator, the Hassam Paving Company, all the right, title and interest in and to said invention and in and to said letters patent numbered 819,652, obtained thereon, together with all claims, demands and causes of action for the past infringement of the said letters patent wheresoever and by whomsoever committed; and ever since the execution and delivery of said assignment your orator, the Hassam Paving Company, has been, and still is the sole and exclusive owner of said letters patent.

VIII.

That heretofore, to wit, prior to the 30th day of November, 1906, the said Walter E. Hassam was the sole, original and first inventor of a certain new and useful invention entitled, "Artificial Structure and Process of Making the Same," a more particular description of which will be found in the letters patent issued therefor by the Government of the United States and hereinafter referred to and to which special reference is hereby made.

IX.

That the said Artificial Structure and Process of Making the Same was a new and useful invention which was neither known nor used by others in this country before the invention and discovery thereof by the said Hassam, and which was neither patented nor described in any printed publication in this or any foreign country before the invention and discovery thereof by the said Hassam, or more than two years before his application for United States letters patent therefor, and at the time of his application for United States letters patent therefor, as hereinafter alleged, the same had not been in public use or on sale in the United States for more than two years, and was not patented or caused to be patented by him, or by his legal representatives or assigns in any foreign country upon an application which was filed more than twelve month prior to the filing of his said application in

this country, nor had the same been abandoned by him.

X.

And your orators further show unto your honors that the said Hassam being, as aforesaid, the original and first inventor of said Artificial Structure and Process of Making the same, did on the said 30th day of November, 1906, duly and regularly file in the patent office of the United States an application in writing, praying for the granting and issuance to him of letters patent of the United States for the same; that prior to the granting and issuing of any patent therefor the said Hassam, for value received, did, by an instrument in writing under his hand and seal, duly witnesses and executed, sell, assign and transfer unto your orator, the Hassam Paving Company, all the right, title and interest in and to said invention, and in and by said assignment did request the Commissioner of Patents to issue such patents as might be granted upon said application to your orator, the Hassam Paving Company, which assignment in writing was filed and recorded in the patent office of the United States prior to the granting and issuance of any patent for said invention; and your orators pray that said instrument in writing may be deemed and taken as a part of this bill, and to the original or to a duly authenticated copy thereof now in your orators' possession, and in court to be produced, your orators pray leave to refer.

XI.

And your orators further show unto your honors that after proceedings duly and regularly had and taken in the matter of said application, to wit, on the 30th day of July, 1907, letters patent of the United States, bearing date on that day and numbered 861,650, were granted, issued and delivered by the Government of the United States to your orator, the Hassam Paving Company, whereby there was granted to your orator, the Hassam Paving Company, its legal representatives or assigns, for the term of seventeen years from the said 30th day of July, 1907, the sole and exclusive right, liberty and privilege to make, use and vend the said invention throughout the United States of America and the territories thereof; that ever since the issuance of said letters patent your orator, the Hassam Paving Company, has been and still is the sole and exclusive owner of said letters patent.

XII.

And your orators further show unto your honors that said letters patent of the United States were issued in due form of law in the name of the United States, under the seal of the patent office of the United States, signed by the Commissioner of Patents of the United States, and prior to the issuance thereof all proceedings were had and taken which were required by law to be had and taken prior to the issuance of letters patent for new and

useful inventions, and said letters patent are ready in court to be produced by your orators, or a duly authenticated copy thereof, and which are hereby referred to and by such reference made a part hereof.

XIII.

And your orators further show unto your honors that heretofore, to wit, prior to the 14th day of November, 1906, the said Walter E. Hassam was the sole, original and first inventor of a certain new and useful invention, entitled "Process for Laying Pavement," a more particular description of which will be found in the letters patent issued therefor by the Government of the United States, and hereinafter referred to, and to which special reference is hereby made.

XIV.

That the said Process for Laying Pavement was a new and useful invention which was neither known, nor used by others in this country, before the invention and discovery thereof by the said Hassam, and which was neither patented nor described in any printed publication in this or any foreign country, before the invention and discovery thereof by the said Hassam, or more than two years before his application for United States letters patent therefor, and at the time of his application for United States letters patent therefor, as hereinafter alleged, the same had not been in public use

or on sale in the United States for more than two years, and was not patented, nor caused to be patented by him, or by his legal representatives or assigns, in any foreign country upon any application which was filed more than twelve months prior to the filing of his said application in this country, nor had the same been abandoned by him.

XV.

And your orators further show unto your honors that the said Hassam, being, as aforesaid, the original and first inventor of said Process for Laying Pavement, did on the said 14th day of November, 1906, duly and regularly file in the patent office of the United States an application in writing, praying for the granting and issuance to him of letters patent of the United States for the same; that prior to the granting and issuing of any patent therefor, the said Hassam, for value received, did by an instrument in writing under his hand and seal, duly witnessed and executed, sell, assign and transfer to your orator, the Hassam Paving Company, all the right, title and interest in and to said invention, and in and by said assignment did request the Commissioner of Patents to issue such patent as might be granted upon said application, to your orator, the Hassam Paving Company, which assignment in writing was filed and recorded in the patent office of the United States prior to the granting and issuance of any patent for said invention; and your orators pray that said instrument in writing may

be deemed and taken as a part of this bill and to the original or to a duly authenticated copy thereof, now in your orators' possession and in court to be produced, your orators pray leave to refer.

XVI.

And your orators further show unto your honors that after proceedings duly and regularly had and taken in the matter of said application, to wit, on April 23rd, 1907, letters patent of the United States, bearing date on that day and numbered 851,625, were granted, issued and delivered by the Government of the United States to your orator, the Hassam Paving Company, whereby there was granted to it, its assigns or legal representatives, for the term of seventeen years from said 23rd day of April, 1907, the sole and exclusive right, liberty and privilege to make, use and vend said invention throughout the United States of America and the territories thereof, and ever since the issuance of said letters patent, as aforesaid, your orator, the Hassam Paving Company, has been and still is the sole and exclusive owner and holder of said letters patent.

XVII.

And your orators further show unto your honors that said letters patent of the United States were issued in due form of law in the name of the United States, under the seal of the patent office of the United States, signed by the Commissioner of Patents of the United States, and prior to the

issuance thereof, all proceedings were had and taken which were required by law to be had and taken prior to the issuance of letters patent for new and useful inventions, and said letters patent are ready in court to be produced by your orators, or a duly authenticated copy thereof, and which are hereby referred to and by such reference made a part hereof.

XVIII.

And your orators further aver that all of said inventions described in and claimed by the said three letters patent Number 819,652, Number 861,650 and Number 851,625, are capable of embodiment and conjoint use in one and the same structure and have been so embodied and conjointly used by them, and will be so embodied and conjointly used by the defendant Reliance Construction Company in its threatened infringement hereinafter complained of.

XIX.

Your orators further say that the Hassam Paving Company was organized particularly to exploit and develop said invention, that it made a large investment for this purpose, and that it and its licensees have made and constructed large amounts of pavements which in construction and mode of operation embody the invention and discovery described and claimed in said three letters patent Numbers 819,652, 861,650 and 851,625; that said inventions or discoveries have been recognized

throughout the United States as a higher order of excellence, and the pavement constructed thereunder has been adopted as the standard by many municipalities and highway commissions; that the rights covered by said three several patents have been acquiesced in generally by the public throughout the United States, with the exception of these defendants, and that the exclusive right to control the same has been and still is of great benefit and advantage to your orators and is the basis of a large and substantial business.

XX.

And your orators further say that your orator, the Hassam Paving Company, on or about the 16th day of July, A. D. 1909, gave and conveyed unto your orator, the Oregon Hassam Paving Company, the exclusive right to use and make said improvements in Pavements and Foundations, and Processes of Laying the Same, according to the said three several letters patent and each of them above recited, for and during the term beginning the 16th day of July, A. D. 1909, and ending with the expiration of the term of said letters patent in the State of Oregon and also a strip in the southern part of the State of Washington, extending from the westerly line of said state, easterly to the Columbia River, and being twenty-five (25) miles in width, measured from the southern boundary of the State of Washington, north, but not elsewhere or in any place, upon the payment of certain license fees or

royalties and certain conditions contained in said license agreement, as in and by said license agreement now in your orators' possession and in court to be produced, to which your orators pray leave to refer, whereby the said Oregon Hassam Paving Company became the exclusive licensee to use and make under said patents in this district.

XXI.

And your orators further aver that your orator, the Oregon Hassam Paving Company, was organized particularly to exploit and develop said inventions in this district; that it has made a large investment for this purpose; that it has had made and constructed large amounts of pavements which in construction and mode of operation embody the invention or discovery described and claimed in said three letters patent Number 819,652, Number 861,650 and Number 851,625; that the said inventions or discoveries have been recognized in this district as of a high order of excellence; that the pavement constructed thereunder has been put in many streets in this district; and that the exclusive right of your orator, the Oregon Hassam Paving Company, to use and make pavements under said patents has been and still is of great benefit and advantage and is the basis of a large and substantial business in this district. That particularly in the City of Portland, in the State of Oregon, the business of your orator, the Oregon Hassam Paving Company, has been and is extensive and profitable

in laying pavements under said patents, and at that place your said orator has invested a large amount of capital, aggregating many thousands of dollars, in advertising and introducing the said pavement and demonstrating the advantage thereof for municipal use as a street pavement, and in providing the machinery and implements used in laying said pavements, and has taken many contracts from the City of Portland prior to the filing of this bill of complaint, for the laying of said pavements, and has actually laid and constructed said pavements under said patents upon many streets in the said city.

XXII.

And your orators further aver that upon every pavement or artificial structure made by them and by said licensees and containing the invention of said three several letters patent Numbers 819,652, 861,650 and 851,625, sufficient notice has been given to the public that the same is patented by affixing thereon the word "Patented," together with the day and year the said three several letters patent were respectively granted.

XXIII.

And your orators further aver that the City of Hood River has adopted an ordinance entitled "Ordinance No. 432. An ordinance providing for the paving of Oak street from Front to Fifth street, Cascade avenue from First to Fifth street, Front street from Oak to State street, First street

from Oak to State street, Second street from Cascade avenue to State street, Third street from Columbia street to State street, Fourth street from Columbia street to Oak street, and providing that the cost thereof shall be a lien thereon upon the abutting property, and repealing all ordinances and parts thereof in conflict herewith"; which said ordinance was passed by the Common Council of the said city on the 10th day of March, 1913, and was approved by the Mayor of the said city on the 11th day of March, 1913, and in and by the said ordinance the said City of Hood River determined and decided by its Common Council to improve the streets and portions of streets mentioned in the title aforesaid, by grading, filling or excavating, as the case may be, from curb line to curb line to such depth and contour as shall be required to receive the paving to be placed thereon so that the paving when finally completed shall be on the established grade of the said streets, and that the said streets shall then be paved from curb line to curb line upon the roadbed as so prepared with single course five inch concrete pavement of such consistency and in the manner and form set forth in the specifications thereof, prepared by the city surveyor of the City of Hood River, which by the terms of the said ordinance were required to be filed with the city recorder of the City of Hood River by the date of the final passage of the said ordinance, or with five inch Hassam pavement of such consistency and in

the manner and form set forth in the specifications therefor prepared by the city surveyor of the City of Hood River, to be filed with the city recorder of the City of Hood River by the date of the final passage of the said ordinance. A copy of said ordinance is hereby referred to, and your orators pray leave to produce the same upon the hearing hereof as though the same was fully set forth herein. That the said ordinance provided for the receiving of bids and the letting of a contract in accordance with the terms and requirements of the said ordinance and for publication and posting of notices in the manner required by law.

XXIV.

That the specifications for the Hassam pavement mentioned in the said ordinance were prepared by the city surveyor of the said City of Hood River and filed with the city recorder of the said city within the time required by the terms of the said ordinance, and in and by the said specifications the said city specified and required the said Hassam pavement when laid to be laid in accordance with the said specifications, which, so far as are material to the matters herein alleged, were and are as follows:

“SPECIFICATIONS FOR FIVE INCH HASSAM PAVEMENT.

“*Cement.*

“Section 1. Cement shall be of a well established brand of American Portland cement, dry and

free from lumps and all foreign substances, delivered on the ground in the original packages, in good condition. It must be a slow setting cement, not showing any sign of set in less than thirty minutes. There shall not be more than 10 per cent of residue left on a sieve having 10,000 meshes to the square inch; and samples of the cement mixed neat, kept moist 24 hours in the open air, and six days in the water, shall show a tensile strength of from 380 to 425 pounds per square inch of section. Persons making proposals shall state what brand of cement they intend to furnish. Upon arrival of cement at Hood River, it must be stored in some place where it can be kept dry until wanted for use. If, upon being opened for use, the cement is found to be caked, it will be rejected.

Sand.

Section 2. All sand must be clean, sharp and free from loam. It shall be washed and screened when considered necessary by the engineer.

Broken Rock.

Section 3. The broken rock used shall be a hard, fine-grained blue basalt, or equally hard crushed rock, free from dirt and screenings, and varying in size from $2\frac{1}{2}$ inches to $1\frac{1}{2}$ inches.

Pea-Stone.

Section 4. The pea-stone used in the top dressing shall be hard, clean and free from dust and dirt.

Placing.

Section 5. After the sub-grade has been completed and accepted by the engineer, the broken rock, carefully graded in size from $2\frac{1}{2}$ inches to $1\frac{1}{2}$ inches, shall be placed in a layer of such thickness that, after rolling or tamping has been completed and the top dressing applied, the surface shall accurately conform to the desired cross-section of the finished pavement, and at no point shall the pavement be less than five (5) inches in thickness. The broken rock shall then be thoroughly compacted by rolling with a steam roller, giving a compression of not less than 250 pounds per inch width of roller and shall be firmly bedded and the voids reduced to a minimum and the surface shall accurately conform to the cross-section of the finished pavement. Such portions of pavement as it may not be possible to roll shall be thoroughly compressed by tamping.

Grouting.

Section 6. The voids in the rock shall then be thoroughly filled with a grout consisting of one part of Portland cement to two parts of sand. This grout shall be sufficiently thin to flow freely and shall be thoroughly and continuously mixed and poured upon the rock until all the voids are filled and the grout flushes to the surface under the rolling or compressing, which shall immediately follow the grouting and be continued until no further compacting results.

Top Dressing.

Section 7. Upon the surface of the pavement thus prepared shall be placed a very thin layer of pea-stone, which shall be thoroughly spread and rolled or compressed even and smooth over the entire surface. The pea-stone layer shall have sufficient thickness to insure the complete filling of voids in pavement surface. Rolling shall continue until the grout flushes to the surface.

Brooming.

Section 8. After rolling, this surface shall, at the discretion of the engineer, be broomed until surplus water is removed and the surface presents a true and even appearance.

Speed of Operations.

Section 9. All operations shall be carried forward with as much speed as is possible and in no case shall cement be rolled or compressed or worked after it has taken its initial set.

Expansion Joints.

Section 10. The pavement shall be constructed with a longitudinal expansion joint, one-half ($\frac{1}{2}$) inch in width along each curb and one-half ($\frac{1}{2}$) inch traverse expansion joints, at right-angles to the center line of the street, every twenty-five (25) feet. The edges of all expansion joints shall be rounded to a radius of about one-half ($\frac{1}{2}$) inch and the joints shall be filled with an approved asphalt joint filler.

Fir Headers.

Section 11. Wooden headers shall be placed along the end of pavement where same abuts an unpaved street. Headers shall be of fir, eight (8) inches thick and not less than eight (8) inches in depth as laid in the street; the top surface shall conform to the finished surface of the paving, and only two pieces of timber shall be used at each cross-section. The headers shall be bedded on concrete at least four (4) inches thick and six (6) inches wider than the outside of timber, and concrete shall be extended upon a slant to reach within one inch of top surface. The earth behind the same shall be immediately tamped hard with heavy iron rammers before the concrete has begun to set.

Protection of Pavement.

Section 12. The pavement shall be sprinkled with water as soon after finished as may be possible without pitting the surface. It shall be kept moist for at least seven days, during which time it shall be protected from the elements by covering with canvas, sand or earth. The pavement shall be closed to traffic for fourteen (14) days and for a longer period if so ordered by the engineer.

Bids will be received on the following items:

- (a) Excavation, per cubic yard.
- (b) Fill or embankment, per cubic yard.
- (c) Hassam pavement, per square yard.
- (d) Fir heading, per lineal foot.

(f) Furnishing and placing monument cases, each.

The following is the engineer's preliminary estimate of quantities of the entire improvement:

3,500 cu. yds. of excavation.

500 cu. yds. of fill or embankment.

19,000 sq. yds. of Hassam pavement.

433 lin. ft. of fir headers.

4 monument cases."

And your orators pray that the said specifications may be deemed and taken as part of this bill, and to the original or a duly authenticated copy thereof, now in your orators' possession and in court to be produced, your orators pray leave to refer.

XXV.

And your orators further aver that in pursuance of the said ordinance the City of Hood River received bids for the said improvement from various bidders for both the pavement called single course concrete and the pavement called Hassam, the latter being the pavement mentioned in the said ordinance and described in the specifications hereinbefore set forth, and the defendant Reliance Construction Company bid the sum of \$23,374.95 for the single course concrete pavement, and the sum of \$27,619.90 for the said Hassam pavement, and by action of the common council of the City of Hood River the last mentioned bid of the Reliance Construction Company, defendant, for the five inch

Hassam pavement was duly accepted and it was ordered by the said common council that the mayor and recorder be instructed and authorized to enter into a contract for the City of Hood River with the said defendant Reliance Construction Company for the five inch Hassam pavement in accordance with its bid. The said action was taken at a meeting of the common council of the City of Hood River on March 24th, 1913, and in pursuance with the authority so given, a contract was entered into between the said City of Hood River, acting by its mayor and recorder and under its corporate seal and pursuant to the said resolution of the common council adopted on the 24th day of March, 1913, and the said defendant Reliance Construction Company as contractor, acting by Joseph Paquet, its president, and A. Giebisch, its secretary, with its corporate seal affixed to the said contract, being dated the 24th day of March, 1913.

XXVI.

That in and by the said contract the said defendant Reliance Construction Company has agreed to and with the City of Hood River to construct, build, furnish all materials for and in every way complete the work of paving Oak street from Front street to Fifth street, Cascade avenue from First street to Fifth street, Front and First streets from Oak street to State street, Third street from Columbia street to State street, and Fourth street from Oak street to Columbia street in the said City of Hood

River, the full width of the roadway from curb line to curb line, doing the necessary work of excavation and filling or embankment, and placing the necessary fir headers and the furnishing and placing of monument cases, in strict accordance with the plans and specifications hereinbefore referred to, and in and by the terms of the said contract the said specifications hereinabove referred to were made a part of the said contract, and it was provided in the said contract between the said parties that the City of Hood River, for and in consideration of the true and faithful performance of the covenants and agreements therein mentioned to be performed by the contractor, agreed to pay the contractor in full for all the work and material to be required by the said contract, at the following rates and prices:

3,500 cu. yds. of excavation, more or less, at 50 cents per cu. yd.

500 cu. yds. embankment, more or less, at 10 cents per cu. yd.

19,000 sq. yds. Hassam pavement, more or less, at \$1.35 per sq. yd.

433 lin. ft. of fir headers, more or less, at 30 cents per lin. ft.

4 monument cases, at \$10.00 each.

And your orators pray that copies of the said proceedings, including copies of the proceedings of the common council, with its resolutions and ordinance, and the plans, specifications and esti-

mates, and the said contract herein referred to, may be deemed and taken as a part of this bill and that your orators have leave to produce authenticated copies thereof and refer to the same as a part of this bill.

XXVII.

That in accordance with the terms and requirements of the said contract and the charter and ordinance of the City of Hood River the defendant Reliance Construction Company executed its bond to the City of Hood River with National Surety Company, defendant, as surety thereon, in the penal sum of \$6,904.95, conditioned that if the said contractor, Reliance Construction Company, shall well and faithfully perform all the covenants and conditions in the said contract mentioned, and shall pay all claims or liens for labor, work or material furnished in or by or on account of the performance of the work under the said contract, whether the same were furnished to or by the contractor, subcontractors, laborers or material men, then the said obligation shall be void, but otherwise remain in full force and virtue; and afterwards the said defendant Reliance Construction Company, pursuant to a demand of the said City of Hood River, furnished an additional bond to the said city with the said defendant National Surety Company as surety thereon, in the penal sum of \$9,500.00, and the conditions of the said last mentioned bond were as follows:

“The conditions of this obligation are such that, Whereas, the above bounden principal, Reliance Construction Company, an Oregon corporation, has entered into a contract with the City of Hood River for the improvement of various streets throughout the said city with hard surface pavement, and,

Whereas, the City of Hood River are desirous of being indemnified against any possible infringement of patent on account of the process used in laying said pavement,

Now, Therefore, if the contractor shall save the City of Hood River harmless of any and all loss or damage which it may suffer on account of or growing out of any suits which may be instituted against the said city by any person, persons or corporations on account of infringement of patent within a period of one year from date, then this obligation shall be void, otherwise to remain in full force and effect.”

That the said bonds were filed with the city recorder of the City of Hood River on the 5th day of April, 1913, and your orators pray leave to refer to a duly authenticated copy of each thereof and that the same may be considered a part of this bill of complaint.

XXVIII.

And your orators further aver that under and by the terms of the said contract and bond and the said ordinance, the said defendants have contracted and agreed and undertaken to and are actually pro-

ceeding to make, use and sell the same pavement and structures that are the inventions described in and claimed by your orators under their three said letters patent Number 819,652, Number 861,650 and Number 851,625, embodying and conjointly using in one and the same structure the several inventions covered by the said patents and claimed by your orators, and have entered upon the said streets and are about to lay down the said pavement thereon.

XXIX.

And your orators say that after the said contract was let by the City of Hood River to the defendant Reliance Construction Company, as hereinbefore stated, your orators gave notice to the City of Hood River and the mayor and council thereof, and also to Reliance Construction Company, defendant; that your orator, Hassam Paving Company, is the owner of the several patents herein mentioned and that your orator Oregon Hassam Paving Company, is the licensee thereof in the State of Oregon, and notified and warned the said defendants and each of them not to infringe the said patents, and warned each of them that in case of an infringement they would be prosecuted as provided by law. That notwithstanding the said notice and warnings the said defendants decided and agreed together that the said contract should be performed. That the defendants well know and at all times herein mentioned were fully advised of the fact that your orator, Hassam Paving Company,

has been the exclusive owner of the said patents and that your orator, Oregon Hassam Paving Company has been the licensee aforesaid under the said patents, and the defendants and each of them deliberately decided and agreed together that they will, notwithstanding the premises, infringe each and all of the claims of each and all of the letters patent hereinabove mentioned, and they and each of them do now threaten to make, sell and use pavements and artificial structures which contain the inventions covered by and secured by the said three several letters patent Numbers 819,652, 861,650 and 851,625, and that in order to carry out the said contract as they threaten to do, each of the pavements and artificial structures made, sold and used in performing the said contracts will infringe all of the inventions described in and claimed by the said letters patent and conjointly combined and used.

XXX.

And your orators aver that the business of your orators in laying down, vending and selling the said pavements and artificial structure under and in accordance with their said patents has reached large proportions in the State of Oregon, more particularly in the City of Portland in the said state, in which city there are now pending before the municipal officers proceedings for the improvements of streets with Hassam pavement, embodying and necessitating the use of the inventions claimed by your orators under the said patents, and that it

is the desire of the City of Portland to advertise for and receive bids for other contracts for such improvements, and that the infringement by the defendants will greatly interfere with the said business of your orators and prevent your orators from enjoying the benefits of their said patents. That your orator, Oregon Hassam Paving Company, on account of its being the sole licensee under the said patents and having the exclusive right to make, use and sell the said inventions in Oregon, and because of its investment and expenditures in introducing the use of the said pavement and in the necessary plant and equipment for doing the said work, is able and ready to undertake all such work, including the work herein mentioned, at Hood River, Oregon. That because of the said wrongful claims and threats of the defendants and the uncertainty of the officers of the different cities of the State of Oregon, including the cities of Hood River and of Portland, occasioned thereby as to the rights of bidders to enter into such contracts and to perform the same and to make use of and to sell the said pavements and artificial structures, the said officers will decline to proceed or to let contracts for Hassam pavement or to carry on any improvement that involves the use of said pavements and artificial structures, so that your orators will lose the opportunity of getting such work and their plant and equipment will be idle, whereby your

orators suffer great, special and irreparable damage and injury.

XXXI.

And your orators further aver that the infringement above complained of by the defendants is a great and continuing injury to them; that said infringement is interfering with the business of making, selling and using, and licensing others to make, use and sell pavements and artificial structures described and claimed in said letters patent Numbers 819,652, 861,650 and 851,625, and your orators further aver that unless the defendants are restrained by writ of injunction issuing out of this court, the said defendants will continue to infringe said patents and will induce and lead others to infringe said patents and thereby will cause irreparable injury to your orators' aforesaid rights.

YOUR ORATORS THEREFORE PRAY your honors to grant unto your orators a preliminary and also a permanent writ of injunction issuing out of and under the seal of this honorable court, directed to the said Reliance Construction Company, the said City of Hood River, and the said Natonal Surety Company, and strictly enjoining them, and each of them, their agents, officers and employees, not to make, use or sell, or cause to be made, used or sold, any pavement or artificial structure which will contain or employ the inventions covered and secured by the claims of said petters patent Numbers 819,652, 861,650 and 851,625, or any of them,

and especially enjoining the defendants, and each of them, and their agents, officers and employees, not to make, use or sell, or cause to be made, used or sold, upon any of the streets hereinbefore mentioned in the City of Hood River, any pavement or artificial structure which will contain or employ the said inventions or any thereof.

AND YOUR ORATORS FURTHER PRAY that the defendants, and each of them, by a decree of this court, may be compelled to account to and pay to your orators, all the profits which they may have derived from any making, using or selling of any pavements or artificial structures covered and secured by said letters patent or any of them, and that also the defendants and each of them be decreed to pay all damages which your orators have incurred or shall incur upon account of the said defendants' infringement of the said several letters patent Numbers 819,652, 861,650 and 851,625 with such increase thereof as shall seem meet.

YOUR ORATORS FURTHER PRAY that the defendants be decreed to pay the cost of this suit and that your orators may have such other and further relief as the equity of the cause or the statutes of the United States require and to this court may seem just.

TO THE END, THEREFORE, that the defendants may, if they can, show why your orators should not have the relief prayed, it is prayed that the de-

fendants, according to the best and utmost of their knowledge, remembrance, information and belief, make full, true, direct and perfect answer to the matters herein before stated and charged, but not under oath, answer under oath being hereby expressly waived; and to the end, therefore, that your orators may have such recovery and relief, may it please your honors to grant unto your orators not only a writ or writs of injunction confirmable to the prayer of this bill, but also a writ of *subpoena ad respondum* issuing out of and under the seal of this Honorable Court and directed to the said defendants Reliance Construction Company, City of Hood River and National Surety Company, and commanding them and each of them to appear before this court then and there to answer this bill and to abide by such decree herein as to this court shall seem just.

HASSAM PAVING COMPANY,

By W. A. Lucy, Pacific Manager.

OREGON HASSAM PAVING COMPANY,

By B. Assmann.

CAREY & KERR,

1410 Yeon Building, Portland, Oregon, Solicitors for Complainants.

SOUTHGATE & SOUTHGATE,

339 Main Street, Worcester, Mass., of Counsel for Complainants.

STATE OF OREGON,

County of Multnomah, ss.

B. Assmann, being duly sworn, deposes and says, that he is the Secretary of OREGON HASSAM PAVING COMPANY, one of the complainants above named; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

B. ASSMANN.

Subscribed and sworn to before me this 1st day of May, 1913.

(Seal.)

OSCAR FURUSET,

Notary Public for Oregon.

Filed May 1, 1913.

A. M. CANNON, Clerk.

And afterwards, to-wit, on the 23rd day of May, 1913, there was duly filed in said court and cause an answer in words and figures as follows, to-wit:

ANSWER.

To the Judges of the District Court of the United States for the District of Oregon:

The Reliance Construction Company, the City of Hood River and the National Surety Company, defendants above named, for answer to Complainants' Bill of Complaint filed herein, admit, deny and allege as follows, to-wit:

I.

Admit that the Hassam Paving Company is a corporation duly organized and existing under the laws of the State of Massachusetts, with its principal place of business in the City of Worcester, Massachusetts; that the Oregon Hassam Paving Company is a corporation created and existing under the laws of the State of Oregon, having its principal place of business in the City of Portland; that the defendant Reliance Construction Company is a corporation duly organized and existing under the laws of the State of Oregon, and a resident of said state; that the defendant National Surety Company is a corporation organized and existing under the laws of the State of New York, having its principal office in the City of New York in the said state, and a citizen of New York, and a resident and inhabitant of the State of New York.

II.

Defendants deny that prior to the 7th day of June, 1905, or at any other time, one Walter E. Hassam was the sole or original or first or any inventor of a certain or any new or useful invention entitled "Pavement and Process of Laying the Same," a description of which is to be found in the letters patent issued therefor by the government of the United States, or otherwise, or at all.

III.

Deny that the said alleged pavement or process

of laying the same was a new or useful invention and was not known nor used by others in this country before the alleged invention or alleged discovery thereof by the said Hassam, or which was not patented nor described in any printed publication in this or any foreign country before the alleged invention and discovery thereof by the said Hassam, or more than two years before his application for United States letters patent therefor, or that at the time of his application for United States letters patent therefor, as set out in complainants' Bill of Complaint, had not been in public use or on sale in the United States for more than two years or was not patented or caused to be patented by him, or his legal representatives, or assigns, in any foreign country, or upon application which was filed more than twelve months prior to the filing of his said application in this country, nor that the same had not been abandoned by him.

IV.

Deny that the said Hassam was the original or first inventor of said or any paving or process of laying the same; that as to whether or not the said Hassam on the 7th day of June, 1905, or at any other time, or at all, duly or regularly filed, or otherwise filed, in the patent office of the United States, application in writing praying for the granting and issuance to him of letters patent of the United States for the same, these defendants have

no knowledge or information sufficient to form a belief and therefore deny the same.

That as to whether or not that prior to the alleged granting and issuing of any patent therefor the said Hassam for value received, or at all, did by an instrument in writing under his hand and seal duly executed and witnessed, or otherwise, or at all, sell, or assign, or transfer unto one Charles K. Pevey of Worcester, County of Worcester, State of Massachusetts, an undivided one-half interest or any interest in or to the said alleged invention or in which said Hassam in or by said alleged assignment did request the Commissioner of Patents to issue such patent as might be granted upon such application, or any patent to the said Walter E. Hassam and Charles Pevey, or either of them, jointly or otherwise; or as to whether or not such alleged assignment in writing was filed and recorded in the patent office of the United States prior to the granting of any issuance of patent for said invention, or at any other time, or at all, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

V.

That as to whether or not after proceedings duly or regularly had or taken in the matter of said alleged application on May 1, 1906, or at any other time, letters patent of the United States bearing date on that day, or any other date, and num-

bered 819,652, or any other number were granted or issued to said Walter E. Hassam and Charles K. Pevey, jointly or otherwise, whereby there was granted to them, or either of them, or their heirs or assigns, for the term of 17 years, from the first day of May, 1906, or otherwise, the sole or exclusive or any right, liberty or privilege to make, use or vend the said alleged invention throughout the United States of America, or the territories thereof, or elsewhere, these defendants have no knowledge or information sufficient to form a belief and therefore deny the same.

VI.

That as to whether or not the said alleged letters patent of the United States were issued in due form of law, or otherwise, in the name of the United States, or under the seal of the patent office of the United States, or were signed by the Commissioner of Patents of the United States; or as to whether or not prior to the issuance thereof, all proceedings were had and taken which were required by law to be had and taken prior to the issuance of letters patent for new and useful inventions, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

VII.

That as to whether or not that before the alleged infringement complained of in complain-

ants' Complaint, said Walter E. Hassam and said Charles K. Pevey, or either of them, by an instrument in writing, or otherwise, duly signed or sealed or delivered by them, and recorded in the United States patent office, did sell, or assign, or transfer to the Hassam Paving Company, all of the right or title or interest in or to said alleged invention, or in or to said alleged letters patent No. 819,652, alleged to have been obtained thereon, together with all right, claims or demands, or cause of action for past infringement of said alleged letters patent; or as to whether or not ever since the said alleged execution and delivery of said alleged assignment, the said Hassam Paving Company has been or still is the sole or exclusive or any owner of said alleged letters patent, these defendants have no knowledge or information sufficient to form a belief and therefore deny the same.

VIII.

Defendants deny that prior to the 30th day of November, 1906, or at any other time, or at all, the said Walter E. Hassam was the sole, original or first or any inventor of a certain or new or useful invention entitled, "Artificial Structure and Process of Making the Same," as shown or set forth in a certain patent alleged to have been issued therefor by the government of the United States referred to in paragraph VIII of complainants' Complaint, or otherwise, or at all.

IX.

Deny that said artificial structure or process of making the same was a new or useful invention which was not known or used by others in this country before the alleged invention and discovery thereof by the said Hassam, or which was not patented nor described in any printed publication in this or any foreign country before the alleged invention and discovery thereof by the said Hassam, or more than two years before his alleged application for United States patent therefor; nor at the time of his said alleged application for United States letters patent therefor, as set forth in complainants' Complaint, the same had not been publicly used or on sale in the United States for more than two years, nor that the same is not patented or caused to be patented by him or by his legal representatives or assigns in any country upon an application which was filed more than twelve months prior to the filing of his said alleged application in this country, or that the same had been abandoned by him.

X.

Deny that the said Walter E. Hassam was the original or first inventor of said artificial structure and process of making the same; that as to whether or not on the said 30th day of November, 1906, the said Hassam duly or regularly filed in the patent office of the United States an application in writing praying for the granting and issuance

to him of letters patent of the United States for the same; or as to whether or not that prior to the granting and issuance of any patent therefor, the said Hassam for value received, or otherwise, did by an instrument in writing under his hand and seal, duly witnessed and executed, sell, or assign or transfer unto the Hassam Paving Company, all or any of the right, title or interest in or to said alleged invention, or did in or by said alleged assignment request the Commissioner of Patents to issue such patents as might be granted upon said application to said Hassam Paving Company; or as to whether or not said alleged assignment in writing was filed or recorded in the patent office of the United States prior to the granting or issuance of any patent for said alleged invention, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

XI.

That as to whether or not on the 30th day of July, 1907, or at any other time letters patent of the United States bearing date as of that day, or any other date, and numbered 861,650, or any other number, were granted or issued or delivered by the government of the United States to the Hassam Paving Company, granting it, or its legal representatives or assigns for the term of seventeen years from said 30th day of July, 1907, the sole or exclusive right, liberty or privilege to make, or use or vend the said alleged invention throughout the

United States of America, or elsewhere; or as to whether or not that ever since the alleged issuance of said letters patent to the said Hassam Paving Company it has been or still is the sole or exclusive or any owner of said letters patent, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

XII.

That as to whether or not said alleged letters patent of the United States were issued in due form of law in the name of the United States, or under the seal of the patent office of the United States, or was signed by the Commissioner of Patents of the United States; or as to whether or not prior to the issuance thereof, all proceedings were had or taken which were required by law to be taken, prior to the issuance of letters patent for new and useful inventions; or whether or not said letters patent are ready in court to be produced by complainants, or a copy thereof, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

XIII.

Deny that prior to the 14th day of November, 1906, or at any other time the said Walter E. Hassam was the sole or original or first or any inventor of a certain new or useful invention entitled, "Process for Laying Pavement," as described in the letters patent issued therefor by the

government of the United States, or otherwise, or at all.

XIV.

Deny that said alleged process for laying pavement was a new or useful invention which was not known or used by others in this country before the alleged invention and discovery thereof by the said Hassam, or that the same was not patented or described in any printed publication in this or any foreign country before the alleged invention and discovery thereof by the said Hassam for more than two years before his alleged application for United States letters patent therefor, as alleged in complainants' Bill of Complaint; or that the same had not been publicly used or on sale in the United States for more than two years, or was not patented nor caused to be patented by him, or by his legal representatives in any foreign country upon any application in this country; or that the same had not been abandoned by him.

XV.

Deny that the said Hassam was the original, or first or any inventor of said process for laying pavement; and as to whether or not the said Hassam did on the 14th day of November, 1906, or at any other time, duly or regularly file in the patent office of the United States an application in writing praying for the granting and issuance to him of letters patent of the United States for the same; or as to whether or not that prior to the granting

and issuing of any patent therefor, the said Hassam for value received, did by an instrument in writing, under his hand and seal duly witnessed and executed, sell, or assign or transfer to the Hassam Paving Company all or any of the right, title or interest in or to the said alleged invention; or as to whether or not the said Hassam did in or by said assignment request the Commissioner of Patents to issue such patent as might be granted upon such application to the Hassam Paving Company, or as to whether or not said assignment in writing was filed and recorded in the patent office of the United States prior to the granting or issuance of any patent for said alleged invention, these defendants have no knowledge or information sufficient to form a belief and therefore deny the same.

XVI.

That as to whether or not after proceedings were duly and regularly had and taken in the matter of the said alleged application on April 23rd, 1907, or at any other time, letters patent of the United States bearing date on that day, or any other day, and numbered 851,625, or any other number were granted or issued and delivered by the government of the United States to the Hassam Paving Company wherein and whereby there was granted to it, or its assigns, or legal representatives, for the term of seventeen years or any other period, from the said 23d day of April, 1907, the

sole or exclusive right, liberty or privilege to make or use or vend said invention throughout the United States of America, or the territories thereof; or as to whether or not ever since the issuance of said letters patent the Hassam Paving Company are still the sole or exclusive or any owner or holder of said alleged letters patent, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

XVII.

That as to whether or not said letters patent of the United States were issued in due form of law or in the name of the United States, or under the seal of the patent office of the United States, or were signed by the Commissioner of Patents of the United States; or as to whether or not prior to the issuance thereof all proceedings were had or taken which were required by law to be had and taken prior to the issuance of letters patent for new or useful inventions, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

XVIII.

Deny that all of said alleged inventions described in and claimed by said alleged three letters patent, No. 819,652, No. 861,650 and No. 851,625, respectively, or any of said patents, are capable of embodiment or conjoint use in one and the same structure, or have been so embodied and con-

jointly used by complainant, or will be so embodied and conjointly used by the defendant Reliance Construction Company in its alleged threatened infringement complained of in complainants' Bill of Complaint.

XIX.

That as to whether or not the Hassam Paving Company was organized particularly or at all to exploit or develop said alleged inventions, or that it made a large investment for this purpose, or that it, or its licensees have made or constructed large amounts of pavements which in construction or mode of operation embody the alleged invention and discovery described and claimed in said three letters patent No. 819,652, No. 861,650 and No. 861,625 or any of them; or as to whether or not said alleged inventions or discoveries have been recognized throughout the United States or elsewhere as a high or any order of excellence, or as to whether or not the pavement constructed thereunder has been adopted as the standard by many or any municipalities or any highway commissions, or as to whether or not the rights covered by said alleged several patents have been acquiesced in generally, or otherwise by the public throughout the United States, or elsewhere, with the exception of these defendants, or as to whether or not the alleged exclusive right to control the same has been or still is of great benefit or advantage to complainant, or is the basis of a large and substantial

business, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

XX.

That as to whether or not the Hassam Paving Company on or about the 16th day of July, 1909, or at any other time, gave and conveyed unto the Oregon Hassam Paving Company, the exclusive right to use and make said alleged improvements in pavements and foundations, or processes of laying the same according to the three alleged several letters patent, during the term beginning the 16th day of July, 1909, or at any other time, or ending with the expiration of the term of said letters patent, or any other time, in the State of Oregon, or a strip in the southern part of the State of Washington, as described in complainants' Bill of Complaint, upon the payment of certain license fees or royalties, or upon certain or any conditions contained in said alleged license agreement, or upon any other conditions, or at all; or as to whether or not the said Oregon Hassam Pavement Company became the exclusive or any licensee to use and make under said alleged patents in this district said alleged or any pavement, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

XXI.

That as to whether or not the Oregon Hassam

Paving Comapny was organized particularly or otherwise to exploit or develop said alleged inventions in this district, or as to whether or not it has made a large or any investment for this purpose, or has made or constructed large amounts of pavements which in construction and mode of operation embody the alleged invention or discovery described and claimed in said three letters patent, No. 819,652, No. 861,650, and No. 851,625, or either of them, or as to whether or not the said alleged inventions or discoveries have been recognized in this district as of a high order of excellence, or that the pavement constructed thereunder has been put in many streets in this district, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

Deny that the Oregon Hassam Paving Company has the exclusive right to use or make pavements under said alleged patent; that as to whether or not said alleged right has been or still is of great or any benefit or advantage, or is the basis of a large and substantial business in this district; or as to whether or not in the City of Portland and the State of Oregon, the business of the Oregon Hassam Paving Company has been or is extensive or profitable in laying pavements under said alleged patents; and as to whether or not the said Paving Company has in the City of Portland invested a large or any sum of capital, aggregating many thousands of dollars, or any sum, or sums, in advertis-

ing or introducing the said pavement, or demonstrating the advantage thereof for municipal use as a street pavement, or in providing the machinery or implements used in laying said pavements, or has taken many contracts from the City of Portland prior to the filing of complainants' Bill of Complaint herein for the laying of said pavements or has actually or at all laid or constructed said pavements under said alleged patents upon many or any streets in this city, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

XXII.

That as to whether or not complainants have affixed upon every or any pavement or artificial structure made by them containing the alleged invention of the three several letters patent, numbered as above, the word "Patented," or any other word, or the day or year the three alleged several letters patent were respectively granted, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

XXIII.

Defendants admit the allegations contained in paragraph XXIII of complainants' Bill of Complaint, but do not waive the production by complainant of a copy of said ordinance.

XXIV.

Admit the allegations contained in paragraph XXIV of complainants' Bill of Complaint, but do not waive the production of the specifications described therein by complainants in court.

XXV.

Admit the allegations contained in paragraph XXV of complainants' Bill of Complaint.

XXVI.

Admit the allegations contained in paragraph XXVI of complainants' Bill of Complaint, but do not waive the production of copies of the proceedings of the Common Council of Hood River with its resolutions and ordinance, and the plans, specifications and estimates and the contract described therein.

XXVII.

Admit the allegations contained in paragraph XXVII of complainants' Bill of Complaint, but do not waive the production of the copy of said bond described therein.

XXVIII.

Admit that the defendant, Reliance Construction Company, under and by the terms of said contract set forth in complainants' Bill of Complaint, have contracted and agreed and undertaken, and are proceeding to pave said streets under said contract and plans and specifications, but deny that the pavements to be used by said defendants in

paving said streets are the inventions of complainants under their three said alleged letters patent numbered 819,652, 861,650 and 851,625, or either of them, or are embodying or conjointly using in one or the same structure the several or any inventions covered by any valid patent owned or controlled by complainants.

XXIX.

Deny that these defendants, or either of them, well, or at all know, or at any of the times or dates mentioned in the Complaint were fully or at all advised of the fact that the Hassam Paving Company has been, or is, the exclusive or any owner of said alleged patents, or that the Oregon Hassam Paving Company has been, or is, the licensee under the said alleged patents; deny that these defendants, or any of them, deliberately, or at all, decided or agreed together, that they would, notwithstanding the premises, or otherwise, infringe each, or all, or any of the alleged claims of each, or all or any of the alleged letters patent mentioned and described in complainants' Complaint; or that they, or each, or any of them do now threaten to make, or sell, or use pavements or artificial structures, which contain any inventions covered by or secured by the said three alleged several letters patent; or that in order to carry out said contract with the City of Hood River, each or any of the pavements or artificial structures made, or sold, or used in performing the said contracts will infringe all or any of the

alleged inventions described in and claimed by the said alleged letters patent, either singularly or conjointly combined or used.

XXX.

That as to whether or not the business of complainants in laying down, or vending or selling the said pavements and artificial structures under or in accordance with their said alleged patents, has reached large or any proportions in the State of Oregon, or in the City of Portland, in said state, or as to whether or not there is pending in said city before the municipal officers, proceedings for the improvements of streets with Hassam pavement, embodying or necessitating the use of the alleged inventions claimed by complainants under the said alleged patents, or as to whether or not it is the desire of the City of Portland to advertise for or receive bids for other contracts for such improvement, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

Deny that the alleged infringement by the defendants, or either of them, will greatly or at all interfere with the said alleged business of complainants, or prevent them from enjoying the benefits of their said alleged patents.

That as to whether or not the Oregon Hassam Paving Company, on account of its being the sole licensee, or any licensee under the said alleged pat-

ents, or having the exclusive right to make, use and sell the said alleged inventions in Oregon, or because of its investment or expenditures in introducing the use of the said pavement, or in the necessary plant or equipment for doing the said work, is able or ready to undertake all such work, including the work mentioned in complainants' Bill of Complaint filed herein, at Hood River, Oregon, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

That as to whether or not because of said, or any alleged wrongful claims or threats of these defendants, or either of them, or any uncertainty of the officers of the different cities of the State of Oregon, including the cities of Hood River or of Portland, occasioned thereby, as to the rights of bidders to enter into such contracts or perform the same, or to make use of, or to sell the said pavements or artificial structures the said officers will decline to proceed with or let contracts for Hassam pavement, or to carry on any improvement that the use of said pavements or artificial structures, or as to whether or not complainants will lose any opportunity of getting such work, or their plant and equipment will be idle, or as to whether or not they will suffer great or any special or irreparable damage and injury, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

XXXI.

Deny that the alleged infringement complained of against these defendants is a great or continuing or any injury to complainants; or that the said alleged infringement is interfering with the business of making, or selling, or using, or licensing others to make, or use or sell pavements or artificial structures described in or claimed in said alleged letters patent 819,652, 861,650 and 851,625, or either of them, or that unless these defendants are restrained by writ of injunction issuing out of this court, these defendants will continue to infringe said alleged patents, or will induce or lead others to infringe said patents or will thereby cause irreparable or any injury to complainants' alleged rights.

These defendants for a first further and separate answer and defense, allege:

I.

That the "Pavement and Process of Laying the same," the "Artificial Structure and Process of Making the Same," and "Process for Laying Pavement," mentioned in complainants' Bill of Complaint, in Articles II to XVIII, both inclusive, and therein alleged to have been discovered and invented by Walter E. Hassam of Worcester Massachusetts, and for which it is also therein alleged that letters patent Nos. 819,652, 861,650 and 851,625 were issued embodying the claims and specifications of said alleged discoveries and inventions, and the specifications for pavement and the process of lay-

ing the same mentioned in Article XXIV of said Bill of Complaint, and therein alleged to embody the inventions covered and secured by said three several letters patent, have been substantially described and specified in United States letters patent granted and issued to persons other than said Walter E. Hassam, or his assigns, and said patents were each and all granted and issued more than two years, and many years prior to the date of said Hassam's alleged invention or discovery and prior to June 7, 1905, being the earliest date on which it is alleged in said Bill of Complaint that said Hassam filed his written application in the patent office of the United States praying for the granting of letters patent to him to secure his alleged discovery and invention.

II.

That the United States letters patent hereinafter mentioned, substantially cover and include the claims and specifications described in said three letters patent Numbered 819,652, 861,650 and 851,625, mentioned as aforesaid in said Bill of Complaint, the said specifications for pavement and the process for laying the same set forth in Article XXIV of said Bill of Complaint, to-wit:

Patent No. 238,706 to John Murphy of Columbus, Ohio, inventor and patentee, issued March 8, 1881, and published in Vol. 19 of the Official Gazette, page 590, and described in certified copy of speci-

fications in the Portland Public Library in the City of Portland, Oregon, under said patent number.

Patent No. 375,273, issued December 20, 1887, to Edward J. DeSmedt, Washington, D. C., inventor and patentee, published in the Official Gazette, Vol. 41, page 1371, and described in certified copy of specifications in the Portland Public Library in said City of Portland, under said patent number.

Patent No. 381,667, issued December 28, 1887, to George A. Bayard, Bellfonte, Pa., inventor and patentee, published in the Official Gazette, Vol. 43, page 4635, and described in certified copy of the specifications in Portland Public Library in said City of Portland under said patent number.

Patent No. 401,752, issued November 19, 1888, to Mordicai Levi, Charleston, W. Va., inventor and patentee, published in Official Gazette, Vol. 47, page 413, and described in certified copy of the specifications in Portland Public Library in the City of Portland under said patent number.

Patent No. 413,278, issued October 22, 1888, to Thomas F. Hagerty, San Francisco, California, inventor and patentee, published in Official Gazette, Vol. 49, page 452, and described in the certified copy of the specifications in Portland Public Library in said City under said patent number.

III.

That the pavement and process for laying the

same as claimed and specified in said three letters patent numbered 819,652, 861,650 and 851,625, and as set forth in said Article XXIV of said Bill of Complaint, had been described in many printed publications more than two years before and many years prior to said Hassam's alleged invention and discovery as set forth in said Bill of Complaint. Among the books and printed publications, in which said alleged invention or discovery of said Hassam is substantially described, in addition to the Official Gazette above mentioned, are the following: March's Thesaurus, Century Dictionary and other dictionaries, under "Grout," "Macadamization."

Encyclopedia Americana, under "Roads and Highways, Improvement of."

Encyclopedia Britannica, 9th Edition, under the title, "Roads and Streets."

"Concrete Plain and Reinforced," 2d Edition, a treatise by Frederick W. Taylor and Sanford E. Thompson.

"Roads and Pavements," by Ira C. Baker, 1st Edition.

"Report of the City Surveyor to the Executive Board of the City of Rochester, New York, for the year ending April 1st, 1894."

Consular Reports on Streets and Highways in Foreign Countries, issued from the Bureau of Statistics, Department of State, published 1891.

“On Limes, Hydraulic Cements and Mortars,”
Gilmore, published 1874.

IV.

That said Walter E. Hassam was not the original or first inventor of any material and substantial part of the pavement and process for laying the same, described in said three letters patent Numbered 819,652, 861,650 and 851,625 mentioned as aforesaid in said Bill of Complaint. Substantially the same pavement and process for laying the same was described and used by John L. Macadam, a Scotch engineer born in the year 1756 and who died about 1836, the road being known as “Macadam Road;” and the same kind of pavement and process for laying the same, except that asphalt or bitumen instead of Portland cement is used for a binder, has been used in Portland, Oregon, and many other cities by Warren Construction Company for a long time prior to said alleged invention and discovery of said Walter E. Hassam and for more than two years prior to his application for a patent therefor; and said pavement and the process for laying the same as specified in said three patents alleged in said Bill of Complaint has been in use in this country and foreign countries for many years and has been within the knowledge of engineers and road-makers since a time long prior to said Hassam’s discovery or invention.

V.

By reason of the patents issued to persons other than said Walter E. Hassam, or his assigns, as above set forth, and the printed publications describing the pavement and the process of laying the same according to the specifications set forth in Article XXIV of said Bill of Complaint, and the knowledge and use by persons other than complainants of the pavement and process of laying the same as described in said three patents of complainants at times long prior to the alleged invention of said Hassam and of the prior state of the art all of which was well known to said Hassam at the time of said Hassam's alleged discovery or invention, the said pavement and process of laying the same, substantially as described in complainants' three patents mentioned in said Bill of Complaint, were not patentable for lack of novelty and invention, and said patents are therefore void.

WHEREFORE, defendants pray for a decree of your honorable court dismissing complainants' Bill of Complaint, as being without equity, and decreeing that defendants recover of and from complainants their costs and disbursements of this suit.

RELIANCE CONSTRUCTION COMPANY,

By Joseph Paquet, President.

A. J. DERBY, Solicitor for City of Hood River.

NATIONAL SURETY COMPANY,

By

JOHN H. HALL, JESSE STEARNS,

Solicitors for Defendants.

(Certified to by John Hall, May 21, 1913.)

Filed May 23, 1913.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on the 30th day of March, 1914, there was duly filed in said court and cause, a Stipulation, in words and figures as follows, to-wit:

STIPULATION.

Carey & Kerr and Louis W. Southgate, for complainants.

Jesse Stearns and John H. Hall, for defense.

Mr. Southgate: If your honor please, there are two cases, and there are certain preliminary stipulations I think ought to be entered on the record before the cases are argued. In the first case, *Hassam Paving Company v. Consolidated Contract Company*, it is agreed between counsel that the record has been put in print, and this is the record of the case which may be submitted to your honor.

Record marked "Exhibit A."

Mr. Stearns: I want to say there are some minor typographical errors, which are not very serious, but we may want to call attention to them.

Mr. Southgate: Certainly, I shall be most happy to have you do so.

Now, if your honor please, in the second case, the *Hassam Paving Company v. The Reliance Contract*

Company, the bill in this case was filed in May, 1913, after the new rules for trial of suits in equity went into effect. The preceding case has been pending some years, and the testimony was taken by deposition, and Mr. Stearns, Mr. Hall and myself, have had a general understanding that the same record should be received in evidence in this second case, insofar as is material to the trial of the second case. In the second case, Mr. Hall has also taken the deposition of a Mr. Gilman, and the only additional record that the plaintiff desires to make is to offer in evidence a certified copy of the proceedings in the City of Hood River, by the municipal authorities of the City of Hood River, with relation to the delay of this particular contract.

Certified copy marked "Exhibit B."

COURT: Is the same question involved in both cases in a general way?

MR. HALL: Yes. There are some additional questions in the first case not involved in the second.

MR. SOUTHGATE: It is also stipulated that the defendants in the second case carried out the contract.

Filed March 30, 1914.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on Monday, the 27th day of April, 1914, the same being the 49th judicial day of the regular March term of said court; present, Hon. Robert S. Bean, United States District Judge, presiding; the following proceedings were had in said cause, to-wit:

DECREE.

At the March term of the District Court of the United States for the District of Oregon, held at the United States Court Room in the City of Portland, on the 27th day of April, 1914. Present, Hon Robert S. Bean, district judge.

This cause came on to be heard at the March term of the said court in the year 1914 and was argued by counsel and was continued for advisement until the present time, and thereupon, upon consideration thereof, it is ORDERED, ADJUDGED AND DECREED as follows:

That letters patent No. 819,652, entitled "Pavement and Process of Laying Same," granted and issued on May 1, 1906, to Walter E. Hassam and Charles K. Pevey jointly, No. 861,650 entitled, "Artificial Structure and Process of Making the Same," granted and issued on July 30, 1907, to Hassam Paving Company, and No. 851,625, entitled "Process for Laying Pavement," granted and issued on April 23, 1907, to Hassam Paving Company, referred to in the Bill of Complaint herein, are good and valid as respects all of the specifications thereof.

That the said Walter E. Hassam was the first and original inventor and discoverer of each and all of the said inventions as described and claimed in the said several patents and the specifications annexed thereto.

That the said inventions and each of them were new and useful inventions that were neither known nor used by others in this country before the invention and discovery thereof by the said Hassam, and which were never patented nor described in any printed publication in this or any foreign country before the invention and discovery thereof by the said Hassam, or more than two years before the application for the United States letters patent therefor, and at the time of the several applications for United States letters patent therefor the same had not been in public use or on sale in the United States for more than two years and were not patented or caused to be patented either by the said inventor or patentees, or by his or their legal representatives or assigns, in any foreign country upon an application filed more than twelve months prior to the filing of the said several applications in this country, nor had the same been abandoned.

That before the infringements complained of in the bill of complaint the Hassam Paving Company, complainant, became and was and still is the sole owner of each of the said patents as alleged in the said bill of complaint, by assignments duly recorded in the patent office of the United States, and

the complainant Oregon Hassam Paving Company became and was and still is the sole licensee in the State and District of Oregon under the said Hassam Paving Company, for the use of the said inventions and improvements as specified in the said patents.

That all of the said inventions and improvements described in and claimed by the said three letters patent No. 819,652, No. 861,650 and No. 851,625, are capable of embodiment and conjoint use in one and the same structure, and have been so embodied and conjointly used by the complainants and also by the defendants in the infringements complained of in said Bill of Complaint.

That the defendants infringed upon the said letters patent and upon the exclusive rights of the complainants under the same, that is to say, by making, using and selling pavements and artificial structures embodying the said inventions and improvements patented as aforesaid, as charged in the Bill of Complaint.

And it is further ORDERED, ADJUDGED, and DECREED that the complainants do recover of the defendants the profits, gains and advantages which the said defendants have received or made or which have arisen or accrued to them or either of them by the manufacture, use or sale of the said pavements and artificial structures in violation of the said letters patent since the 1st day of May, 1913, and that the complainants do

recover the damages resulting from said infringements.

And it is further ORDERED, ADJUDGED, and DECREED that the complainants do recover of the defendants their costs, charges and disbursements in this suit to be taxed.

And it is further ORDERED, ADJUDGED, and DECREED that it be referred to Wallace McCamant, the standing master in chancery, his experience in such matters being found by the court a sufficient reason for such appointment, to ascertain, take and state, and report to the court, an account of the number of pavements and structures embodying the said inventions and improvements and each thereof, described and secured in the said letters patent made and used or sold by the said defendants, and also the gains, profits and advantages which the said defendants have received or which have arisen or accrued to them or either of them, since the 1st day of May, 1913, from infringing the said exclusive rights of the said complainants by the manufacture, use or sale of the said inventions and improvements in the said letters patent, and the damages which the complainants have suffered by said infringements.

And it is further ORDERED, ADJUDGED and DECREED that the complainants on such accounting have the right to cause the examination

of the officers of the said defendant corporations *ore tenus*, or otherwise, and also the production of the books, vouchers and documents of the said defendants, and that the officers of the said defendant corporations attend for such purpose before the said master from time to time as the said master shall direct.

And it is further ORDERED, ADJUDGED and DECREED that a perpetual injunction be issued in this suit against the said defendants and each of them, restraining them, their agents, clerks, servants and all claiming or holding under or through them or either of them, from making or selling or in any way using or disposing of pavements and structures embracing the inventions or improvements described in the said letters patent, pursuant to the prayer of the said Bill of Complaint.

Jurisdiction is hereby retained for the purpose of making and enforcing any additional order or orders as may be deemed necessary relative to this suit and to enforce compliance with this decree.

(Signed) R. S. BEAN,
United States District Judge.

Filed April 27, 1914.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on the 21st day of May, 1914, there was duly filed in said court and cause, a Petition for Appeal, in words and figures as follows, to-wit:

PETITION FOR APPEAL.

To the Honorable Judges of the District Court of the United States, for the District of Oregon:

The above named defendants conceiving themselves aggrieved by the decree and order made, rendered and entered on the 27th day of April, 1914, in the above entitled cause, do hereby appeal from said decree and order to the United States Circuit Court of Appeals for the Ninth Circuit, for the grounds and reasons specified in the assignment of errors filed herewith.

And the said defendants, petitioning appellants, pray that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree and order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, conformable to the statute in such cases made and provided.

JESSE STEARNS & JOHN H. HALL,

Solicitors for Defendants.

Filed May 21, 1914.

A. M. CANNON,

Clerk.

And afterwards, to-wit, on the 21st day of May, 1914, there was duly filed in said court and cause, assignment of errors, in words and figures as follows, to-wit:

ASSIGNMENT OF ERRORS.

To the Honorable Judges of the Circuit Court of the United States for the Ninth Circuit and District of Oregon, in Equity Sitting:

Now come the above named defendants, and having prayed for an allowance of an appeal from the interlocutory decree rendered and given against them on the 27th day of April, 1914, and entered in said cause, assign for errors in said decree, the following:

First: Said District Court of the United States in and for the District of Oregon, erred in determining and deciding that letters patent No. 819,652, entitled "Pavement and Process of Laying the Same," granted and issued on May 1, 1906, to Walter E. Hassam and Charles K. Pevey jointly; No. 861,650, entitled "Artificial Structure and Process of Making Same," granted and issued on July 30, 1907, to Hassam Paving Company; and No. 851,625, entitled "Process for Laying Pavement," granted and issued on April 23, 1907, to Hassam Paving Company, mentioned in the Bill of Complaint herein, are good and valid in any respect.

Second: That the said District Court erred in determining and deciding that Walter E. Hassam

was the first and original inventor and discoverer of each and all of the said alleged inventions as described and claimed in the said several patents, and the specifications annexed thereto.

Third: That the said District Court erred in determining and deciding that the claims and specifications mentioned in said patents, or any of them, were new and useful inventions; that they were neither known nor used by others in this country, before the alleged invention and discovery thereof by the said Walter E. Hassam; and that the said claims and specifications mentioned in the said patents were never patented or described in any printed publication in this or any foreign country before the alleged invention and discovery thereof by the said Hassam, or more than two years before the application for United States letters patent thereof; and that at the time of the several applications for United States letters patent therefor the said claims and specifications had not been in public use in the United States for more than two years.

Fourth: That the said District Court erred in not determining and deciding that the said claims and specifications mentioned in the said several patents and each of them, were void for lack of novelty and invention.

Fifth: That the said District Court erred in deciding and determining that said defendants have infringed upon the rights of said complainants

claimed under the said three letters patent, No. 819,652, 861,650, and 851,625.

Sixth: Said District Court erred in finding and determining that the complainants are entitled to recover damages from the said defendants by reason of any violation of any rights of the complainants under said letters patent.

Seventh: That the said District Court erred in determining and deciding that the complainants should have a perpetual injunction in this case against the defendants and each of them, restraining them, their agents, clerks, servants and all claiming or holding under or through them or either of them, from making, selling, using or disposing of pavements and structures embracing the alleged inventions or improvements described in the said letters patent.

Eighth: That the said District Court erred in not finding and decreeing for said defendants on the record.

Ninth: That the Findings and Decree of the said District Court are against the law and equity of the case.

WHEREFORE, said defendants pray that the said Order and Decree of April 27th, 1914, be reversed, and that the said District Court of the United States for the District of Oregon be directed to enter an Order and Decree in consonance

with law and equity herein; and your petitioner will ever pray.

JESSE STEARNS & JOHN H. HALL,
Solicitors for Defendants.

Filed May 21, 1914.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on Thursday, the 21st day of May, 1914, the same being the 70th judicial day of the regular March term of said court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to wit:

ORDER ALLOWING APPEAL.

This day came Reliance Construction Company, a corporation, City of Hood River, a municipal corporation, and National Surety Company, a corporation, defendants, and presented their petitions for an appeal and the assignment of errors accompanying the same, and upon consideration thereof, it is

ORDERED: That the said appeal and claim of appeal be and is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit, upon the filing of a bond in the sum of five hundred dollars (\$500.00), with good and sufficient surety to be approved by the court; and in the meantime, until the hearing and determination of this

appeal that the accounting under the order and decree appealed from, be suspended and stayed.

Dated May 21, 1914.

R. S. BEAN,
Judge.

Filed May 21, 1914.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on the 27th day of May, 1914, there was duly filed in said court and cause, Bond on Appeal, in words and figures as follows, to-wit:

BOND ON APPEAL.

Know all men by these presents: That we, Reliance Construction Company, a corporation, City of Hood River, a municipal corporation, and National Surety Company, a corporation, appellants, as principals, and New England Casualty Company, of Boston, Massachusetts, as surety, are held and firmly bound unto Hassam Paving Company, a corporation, and Oregon Hassam Paving Company, a corporation, complainants, appellees, in the full and just sum of five hundred dollars (\$500.00), to be paid unto them, their successors or assigns, to which payment well and truly to be made we ourselves are bound as well as our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 22d day of May, 1914.

Whereas, lately in the District Court of the United States, for the District of Oregon, in a suit depending in said court as hereinabove first entitled, an order and decree was rendered and entered against the above named defendants, the appellants, who, having obtained an appeal therefrom to the United States Circuit Court of Appeals for the Ninth Circuit, and filed a copy of said appeal in the clerks office, to reverse the aforesaid decree, and a citation has issued directed to the said several appellees citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco in said circuit on the return day of said citation next;

Now, the condition of the above obligation is such that if the said appellants shall prosecute their appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation is void; else to remain in full force and effect.

RELIANCE CONSTRUCTION COMPANY,
CITY OF HOOD RIVER, and NATIONAL
SURETY COMPANY,

By Jesse Stearns, Attorney.

Principals.

NEW ENGLAND CASUALTY COMPANY,

By Louis Van Orman,

Its Attorney-in-Fact,

(Seal)

Surety.

Sealed and delivered in the presence of:

J. M. HIATT

M. A. IMBLER

By C. M. Kirkley,

Its Attorney-in-Fact.

Countersigned at Portland, Ore.

SEELEY & CO.,

General Agents.

Pursuant to order heretofore entered touching said appeal this Bond is presented to me for approval and I hereby approve the same.

R. S. BEAN,

Judge.

Filed May 27, 1914.

A. M. CANNON,

Clerk.

And afterwards, to-wit, on the 24th day of June, 1914, there was duly filed in said court and cause, stipulation, in words and figures as follows, to-wit:

STIPULATION.

It is stipulated and agreed, by and between the parties hereto that the appeals from the judgment and decree granting an injunction in the above entitled suits, may be heard together upon one transcript and record of the proceedings in the District Court of the United States for the District of Oregon, and the same relief granted in each cause

by the Court of Appeals as though heard upon separate records.

CAREY & KERR,
Solicitors for Appellees.

JESSE STEARNS & JOHN H. HALL,
Solicitors for Appellants.

Filed June 24, 1914.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on the 24th of June, 1914, there was duly filed in said court and cause, stipulation in words and figures as follows, to-wit:

STIPULATION.

It is hereby stipulated and agreed between the parties to the above entitled cause, that the time of appellants within which to file their praecipe and statement of the evidence, may be enlarged and extended to July 24th, and that an order to that effect may be entered without further notice.

CAREY & KERR,
Solicitors for Appellees.

JESSE STEARNS & JOHN H. HALL,
Solicitors for Appellants.

Filed June 24, 1914.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on Wednesday, the 24th day of June, 1914, the same being the 99th judicial day of the regular March term of said court; present: the Honorable R. S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER.

On the stipulation entered into by and between the parties, and on motion of appellants, it is

ORDERED: That the time of appellants within which to file their praecipe and statement of the evidence, may be enlarged and extended to July 24th.

R. S. BEAN,
Judge.

Filed June 24, 1914.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on Wednesday, the 24th day of June, 1914, the same being the 99th judicial day of the regular March term of said court; present: the Honorable R. S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER.

On the stipulation entered into by and between the parties, it is

ORDERED: That the appeals from the judg-

ment and decree granting an injunction in the above entitled suits may be heard together upon one transcript and record of the proceedings in the District Court of the United States for the District of Oregon, and the same relief granted in each cause by the Court of Appeals as though heard upon separate records.

R. S. BEAN,
Judge.

Filed June 24, 1914.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on Wednesday, the 24th day of June, 1914, the same being the 99th judicial day of the regular March term of said court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER.

Upon the stipulation of the parties and on motion of attorneys for appellants, it is

ORDERED: That the time of appellants within which to file transcript in the above entitled cause and docket the cause in the Circuit Court of Appeals, be, and the same is hereby extended thirty days.

R. S. BEAN,
Judge.

Filed June 24, 1914.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on Wednesday, the 22d day of July, 1914, the same being the 15th judicial day of the regular July term of said court; present: the Honorable Robert S. Bean, United State District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER.

On the stipulation entered into by and between the parties, and on motion of appellants, it is

ORDERED: That the time of appellants within which to file their praecipe and statement of evidence, may be enlarged and extended to August 24th, 1914.

R. S. BEAN,
Judge.

Filed July 22, 1914.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on the 22d day of July, 1914, there was duly filed in said court and cause, stipulation in words and figures as follows, to-wit:

STIPULATION.

It is stipulated and agreed: That the time within which to file transcript in the above entitled cause, and docket the same in the Circuit Court of

Appeals, be and the same is hereby extended thirty days to August 24th, 1914.

CAREY & KERR,

Solicitors for Appellees.

JESSE STEARNS & JOHN H. HALL,

Solicitors for Appellants.

Filed July 22, 1914.

A. M. CANNON,

Clerk.

And afterwards, to-wit, on the 22d day of July, 1914, there was duly filed in said court and cause, stipulation, in words and figures as follows, to-wit:

STIPULATION.

It is hereby stipulated and agreed between the parties to the above entitled cause, that the time of appellants within which to file their praecipe and statement of the evidence, may be enlarged and extended to August 24th, and that an order to that effect may be entered without further notice.

CAREY & KERR,

Solicitors for Appellees.

JESSE STEARNS & JOHN H. HALL,

Solicitors for Appellants.

Filed July 22, 1914.

A. M. CANNON,

Clerk.

And afterwards, to-wit, on Wednesday, the 22d day of July, 1914, the same being the 15th judicial

day of the regular July term of said court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER.

Upon the stipulation of the parties and on motion of attorneys for appellants, it is

ORDERED: That the time of appellants within which to file transcript in the above entitled cause and docket the cause in Circuit Court of Appeals, be, and the same is hereby extended thirty days.

Dated July 22, 1914.

R. S. BEAN,
Judge.

Filed July 22, 1914.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on Saturday, the 24th day of August, 1914, the same being the 47th judicial day of the regular July term of said court; present: the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

ORDER.

On stipulation entered into by and between the parties, and on motion of appellants, it is

ORDERED: That the time of appellants within which to file their praecipe and statement of the

evidence, may be enlarged and extended to August 29th, 1914.

R. S. BEAN,
Judge.

Filed August 24, 1914.

G. H. MARSH,
Clerk.

And afterwards, to-wit, on the 24th day of August, 1914, there was duly filed in said court and cause, stipulation in words and figures as follows, to-wit:

STIPULATION.

It is hereby stipulated and agreed between the parties to the above entitled cause, that the time of appellants within which to file their praecipe and statement of the evidence, may be enlarged and extended to August 29th, and that an order to that effect may be entered without further notice.

CAREY & KERR,
Solicitors for Appellees.

JESSE STEARNS & JOHN H. HALL,
Solicitors for Appellants.

Filed August 24, 1914.

G. H. MARSH,
Clerk.

And afterwards, to-wit, on the 24th day of August, 1914, there was duly filed in said court and

cause, stipulation in words and figures as follows, to-wit:

STIPULATION.

It is stipulated and agreed: That the time within which to file transcript in the above entitled cause, and docket the same in the Circuit Court of Appeals, be and the same is hereby extended to the 29th day of August, 1914.

CAREY & KERR,

Solicitors for Appellees.

JESSE STEARNS & JOHN H. HALL,

Solicitors for Appellants.

Filed August 24, 1914.

G. H. MARSH,

Clerk.

And afterwards, to-wit, on Monday, the 24th day of August, 1914, the same being the 43d judicial day of the regular July term of said court; present: the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

ORDER.

Upon the stipulation of the parties and on motion of attorneys for appellants, it is

ORDERED: That the time of appellants within which to file transcript in the above entitled cause and docket the cause in the Circuit Court of Ap-

peals, be, and the same is hereby extended to August 29th, 1914.

Dated August 24th, 1914.

R. S. BEAN,
Judge.

Filed August 24, 1914.

G. H. MARSH,
Clerk.

And afterwards, to-wit, on the 29th day of August, 1914, there was duly filed in said court and cause, stipulation in words and figures as follows, to-wit:

STIPULATION.

It is hereby stipulated and agreed between the parties to the above entitled cause, that the time of appellants within which to file their praecipe and statement of the evidence, may be enlarged and extended to Sept. 5, 1914, and that an order to that effect may be entered without further notice.

CAREY & KERR,
Solicitors for Appellees.

JESSE STEARNS & JOHN H. HALL,
Solicitors for Appellants.

Filed August 29, 1914.

G. H. MARSH,
Clerk.

And afterwards, to-wit, on Saturday, the 29th day of August, 1914, the same being the 47th judicial day of the regular July term of said court; present: the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

ORDER.

On the stipulation entered into by and between the parties, and on motion of appellants, it is

ORDERED: That the time of appellants within which to file their praecipe and statement of the evidence, may be enlarged and extended to Sept 5th, 1914.

R. S. BEAN,
Judge.

Filed August 29, 1914.

G. H. MARSH,
Clerk.

And afterwards, to-wit, on the 29th day of August, 1914, there was duly filed in said court and cause, stipulation in words and figures as follows, to-wit:

STIPULATION.

It is stipulated and agreed: That the time within which to file transcript in the above entitled cause, and docket the same in the Circuit Court of

Appeals, be and the same is hereby extended to the 28th day of September, 1914.

CAREY & KERR,

Solicitors for Appellees.

JESSE STEARNS & JOHN H. HALL,

Solicitors for Appellants.

Filed August 29, 1914.

G. H. MARSH,

Clerk.

And afterwards, to-wit, on the 4th day of September, 1914, there was duly filed in said court and cause, notice in words and figures as follows, to-wit:

NOTICE.

To Carey & Kerr, Solicitors for Respondents:

You will please take notice that the appellants' statement of the evidence in the above entitled suits has been lodged in the clerk's office for examination by respondents, and the same will be presented to one of the judges of this court for approval on the 20th day of September, 1914, at 10 o'clock A. M.

JESSE STEARNS & JOHN H. HALL,

Solicitors for Appellants.

Filed Sept. 4, 1914.

G. H. MARSH,

Clerk.

And afterwards, to wit, on the 26th day of September, 1914, there was duly filed in said court and cause, stipulation in words and figures as follows, to wit:

STIPULATION.

It is hereby stipulated by and between the parties hereto that further proceedings on the appeal in the above entitled cause be suspended and stayed, pending the appeal and decision thereon in the cause now pending in the United States Circuit Court of Appeals for the Ninth Circuit, entitled Hassam Paving Company, a corporation, and Oregon Hassam Paving Company, a corporation, appellees, against Consolidated Contract Company, a corporation, and Pacific Coast Casualty Company, a corporation, appellants; and that the parties to this cause and to this stipulation shall abide by the determination and result of the said cause, so to be heard and determined by said Appellate Court.

That is to say in the event the decree in the cause on appeal shall be affirmed, the decree of the United States District Court for Oregon shall stand, and an order be entered dismissing the appeal in this cause; and in the event that said decree in the cause on appeal shall be referred, then the decree of said District Court in this cause shall also be vacated.

Dated September 24th, 1914.

LOUIS W. SOUTHGATE and
CAREY & KERR,

Solicitors for Appellees.

JESSE STEARNS & JOHN H. HALL,

Solicitors for Appellants.

Filed September 26th, 1914.

G. H. MARSH, Clerk.

Afterwards, to wit, on the 27th day of March, 1916, there was duly filed in said court and cause, a stipulation in words and figures as follows, to wit:

STIPULATION.

WHEREAS, on the 21st day of May, 1914, a petition for appeal from the final decree in the above entitled cause, together with an assignment of errors, were filed in the above entitled court, and an appeal was, by order of the said court, entered on the said date, allowed, and on the 27th day of May, 1914, a bond on appeal was filed in the said cause, but no further proceedings upon the said appeal were taken and no transcript of record upon the said appeal was taken from the office of the clerk of the said court or filed in the Circuit Court of Appeals; and,

WHEREAS, by stipulation between the parties, dated September 24th, 1914, the parties to the said cause stipulated and agreed to abide by the determination and result of an appeal in a certain cause then pending in the United States Circuit Court of Appeals for the Ninth Circuit in cause No. 3818, entitled, Hassam Paving Company, a corporation, and Oregon Hassam Paving Company, a corporation, appellees, against Consolidated Contract Company, a corporation, and Pacific Coast Casualty

Company, a corporation, appellants, and further stipulated and agreed that in the event that the decree in the last mentioned cause on appeal should be affirmed, the decree of the United States District Court for the District of Oregon in cause No. 5966 should stand, and that an order be entered dismissing the appeal therein, and in the event that said decree in the cause on appeal be reversed, the decree of the District Court in cause No. 5966 be vacated; and,

WHEREAS, on the 11th day of October, 1915, a final decree was rendered by the United States Circuit Court of Appeals affirming the decree in the said cause, entitled, Hassam Paving Company, a corporation, and Oregon Hassam Paving Company, a corporation, appellees, against Consolidated Contract Company, a corporation, and Pacific Coast Casualty Company, a corporation, appellants, (No. 3818), and in accordance with the said final decree, mandate in the said cause has been entered in the United States District Court for the District of Oregon on the 27th day of March, 1916;

IT IS NOW THEREFORE AGREED by and between the parties hereto that the appeal in this suit shall be abandoned and that the original decree of the United States District Court for the District of Oregon, made and entered on the 27th day of April, 1914, shall stand as the final decree in this cause, notwithstanding the said appeal, and that the appeal shall be withdrawn; and,

WHEREAS, by the original decree the said cause was referred to Wallace McCamant, Esq., the Standing Master in Chancery,

IT IS FURTHER STIPULATED AND AGREED that the parties proceed with the said accounting under the said decree and in accordance with the terms thereof.

Dated March 27th, 1916.

CAREY & KERR,

LOUIS W. SOUTHGATE,

Solicitors for Complainants.

JOHN H. HALL & JESSE STEARNS,

Solicitors for Defendants.

Filed March 27th, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on Monday, the 27th day of March, 1916, the same being the 19th judicial day of the regular March, 1916, term of said court; present, the Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

ORDER WITHDRAWING APPEAL.

Now, at this day, come the plaintiffs, by Mr. Charles H. Carey, of counsel, and the defendants by Mr. Jesse Stearns, of counsel, and it appearing to the court from the stipulation filed in this cause and from the record in this cause that by a stipulation entered into between the parties to this cause,

dated September 24th, 1914, the parties hereto agreed to abide by the determination and result of an appeal in a certain cause then pending in the United States Circuit Court of Appeals for the Ninth Circuit in cause No. 3818, entitled Hassam Paving Company, a corporation, and Oregon Hassam Paving Company, a corporation, appellees, against Consolidated Contract Company, a corporation, and Pacific Coast Casualty Company, a corporation, appellants, and further stipulated and agreed that in the event that the decree in the last mentioned cause on appeal should be affirmed, the decree of the United States District Court for the District of Oregon in cause No. 5966 should stand, and that an order be entered dismissing the appeal therein, and in the event that said decree in the cause on appeal be reversed, the decree of the District Court in cause No. 5966 be vacated; and it further appearing, on the 11th day of October, 1915, a final decree was rendered by the United States Circuit Court of Appeals, affirming the decree in the said cause, entitled, Hassam Paving Company, a corporation, and Oregon Hassam Paving Company, a corporation, appellees, against Consolidated Contract Company, a corporation, and Pacific Coast Casualty Company, a corporation, appellants, (No. 3818), and in accordance with the said final decree, mandate in the said cause has been entered in the United States District Court for the District of Oregon on the 27th day of March, 1916:

Now, on motion of said plaintiff, in accordance with the said stipulation, IT IS ORDERED that the appeal in this cause be deemed abandoned and that the original decree of this court, made and entered on the 27th day of April, 1914, will stand as the final decree in this cause, notwithstanding the said appeal. And it appearing that by the said original decree this cause was referred to Wallace McCamant, Master in Chancery of this court, to ascertain the damages suffered by said plaintiffs and that said reference was stayed by said appeal,

IT IS FURTHER ORDERED that the said master in chancery proceed with the said reference in accordance with the terms of the said decree.

CHAS. E. WOLVERTON,

Judge.

Filed March 27th, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 26th day of April, 1916, there was duly filed in said court and cause, affidavit of C. H. Carey, in words and figures as follows, to wit:

AFFIDAVIT.

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

I, Charles H. Carey, being first duly sworn, say that I am one of the solicitors for the complainants in the above entitled suit.

This cause having been referred to Hon. Wallace McCamant, Master in Chancery, for an accounting, in pursuance of the decree, I applied to him in behalf of the complainants to assign a time and place for proceeding in the accounting and to give due notice thereof to each of the parties or their solicitors, presenting him with a certified copy of the decree. Thereupon he designated Wednesday, April 26th, 1916, at the hour of ten o'clock A. M., as the time and his office in the Northwestern Bank Building as the place for proceeding with the said accounting, and gave notice to the parties and their solicitors. Likewise, under date April 20th, 1916, I mailed notice of the time for the said hearing, as aforesaid (of which the attached marked "Exhibit A" is a copy), addressed to Messrs. Jesse A. Stearns and John H. Hall, who throughout the proceedings in the above entitled suit have appeared for and represented as attorneys and counsel the defendant Reliance Construction Company and the defendant National Surety Company, and also requested them to produce the account books of the said defendants with all original contracts, and to be prepared at that time and place to make disclosure as to all infringements of the patents covered by the decree in that case, with full statement of all receipts and disbursements and full account of the profits, if any, made through the use of the Hassam patents.

At the time and place aforesaid, Mr. Jesse A. Stearns, one of the counsel for said defendants,

appeared before the master, but disclaimed any authority to represent the Reliance Construction Company or National Surety Company, defendants, upon the said accounting. Thereupon the said master adjourned the hearing until Wednesday, May 3rd, 1916, at the hour of ten o'clock A. M., at the same place. It will be necessary to give further notice to them and each of them, and for that purpose a summons or warrant to issue by the master, directed to the said defendants, requiring them to appear and render themselves for the said accounting and to produce such books and papers as are required therefor.

In behalf of the complainants I have to request, therefore, that due notice be given and served upon the said defendants and each of them, to be and appear before the master at the time and place aforesaid, and also to have there in court all the books and papers in their possession, or in the possession of either of them, which relate to the contract referred to in the bill of complaint, with the City of Hood River, Oregon, upon which the infringement complained of occurred, and all books and vouchers in the possession of them or either of them which show the cost of labor and materials used in making Hassam pavement under the said contract, or otherwise, and all profits made by the defendants or either of them in the performance of the said contract, and especially all day books, journals, ledgers, order books, blotters and cash

books used by the defendants in connection with the performance of the said contract, and also all letters and notices received from Hassam Paving Company or Oregon Hassam Paving Company or either of them, notifying the said defendants or either of them not to infringe upon the said patents or advising the said defendants or either of them that the complainants or either of them were ready and prepared to furnish license, equipment and service offered in a certain proposal filed by the said complainants with the City of Hood River relating to the performance of the said contract, and particularly a certain letter of date April 9th, 1913, addressed by Oregon Hassam Paving Company to Reliance Construction Company, Portland, Oregon.

CHAS. H. CAREY.

Subscribed and sworn to before me this 26th day of April, 1916.

(Seal)

OSCAR FURNSET,

Notary Public for Oregon.

My commission expires Dec. 1, 1916.

EXHIBIT A.

. Portland, Oregon, April 20, 1916.

Messrs. Jesse A. Stearns and John H. Hall,
Attorneys for Consolidated Contract Company,
Reliance Construction Company, *et al.*,
Portland, Oregon.

Gentlemen:

Mr. Wallace McCamant, Master in Chancery,
has set April 26th, at ten o'clock A. M., for the ac-

counting in the Hassam Paving Company suits. On that occasion you will please produce the account books of the defendants, with all original contracts, and be prepared to make full disclosure as to all infringements of the patents covered by the decrees in those cases, with full statement of all receipts and disbursements and a full account of the profits, if any, made through the use of the Hassam patents.

Yours truly,

(Signed) CAREY & KERR.

CHC-H

Filed April 26th, 1916.

G. H. MARSH, Clerk.

And afterwards, on the 26th day of April, 1916, the master issued a master's summons and the same was served and was duly filed in said court and cause with return of service thereon on the 18th day of August, 1916, and said master's summons and said return are in words and figures as follows:

RETURN ON SERVICE OF WRIT.

United States of America,
District of Oregon,—ss.

I hereby certify and return that I served the annexed master's summons on the therein-named National Surety Company, a corporation, by handing to and leaving a true and correct copy thereof with Marc Robbert as agent and attorney in fact

for said above-named company corporation personally at Portland in said district on the 26th day of April, A. D. 1916.

JOHN MONTAG,

U. S. Marshal.

By D. B. FULLER,

Deputy.

RETURN ON SERVICE OF WRIT.

United States of America,

District of Oregon,—ss.

I hereby certify and return that I served the annexed master's summons on the therein-named Reliance Construction Company, a corporation, by handing to and leaving a true and correct copy thereof with Joseph Paquet as president of the above-named company corporation personally at Portland in said district on the 27th day of April, A. D. 1916.

JOHN MONTAG,

U. S. Marshal.

By D. B. FULLER,

Deputy.

*In the District Court of the United States for the
District of Oregon.*

In Equity.

HASSAM PAVING COMPANY, a corporation, and
OREGON HASSAM PAVING COMPANY, a
corporation,

Complainants,

vs.

RELIANCE CONSTRUCTION COMPANY, a cor-
poration; CITY OF HOOD RIVER, a municipal
corporation, and NATIONAL SURETY COM-
PANY, a corporation,

Defendants.

No. 5966. MASTER'S SUMMONS.

To Reliance Construction Company and National
Surety Company, defendants:

The undersigned as master in chancery, having
been appointed to state the account authorized by
the decree herein, you are required and directed to
be and appear before me at my office in the North-
western Bank Building in the City of Portland,
Oregon, on the 3rd day of May, 1916, at ten o'clock
in the forenoon, then and there to render to me,
upon the oath or oaths of such one or more of you,
or either of you, or the officers or agents of you or
either of you, as shall have the most certain and
full knowledge of the same, an account and state-
ment of all profits made by you upon any and all
infringements of the patents described in the decree
in this suit, and then and there produce all the

books and papers in your possession or in the possession of either of you, which relate to the contract referred to in the bill of complaint, with the City of Hood River, Oregon, upon which the infringement complained of occurred, and all books and vouchers in the possession of you or either of you which show the cost of labor and materials used in making Hassam pavement under the said contract, or otherwise, and all profits made by you or either of you in the performance of the said contract, and especialy all day books, journals, ledgers, order books, blotters and cash books used by you or either of you in connection with the performance of the said contract, and also all letters and notices received from Hassam Paving Company or Oregon Hassam Paving Company, or either of them, notifying you or either of you not to infringe upon the said patents or advising you or either of you that the complainants or either of them were ready and prepared to furnish license, equipment and service offered in a certain proposal filed by the said complainants with the City of Hood River relating to the performance of the said contract, and particularly a certain letter, of date April 9th, 1913, addressed by Oregon Hassam Paving Company to Reliance Construction Company, Portland, Oregon.

Dated at Portland, Oregon, this 26th day of April, 1916.

(Signed) WALLACE McCAMANT,
Master in Chancery.

Filed August 18th, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 5th day of June, 1916, there was duly filed in said court and cause, affidavit of J. H. Crane, (*re* stipulation to take testimony of E. O. Hall by deposition, in words and figures as follows, to wit:

AFFIDAVIT.

United States of America,
District and State of Oregon,
County of Multnomah,—ss.

I, J. H. Crane, being first duly sworn, say, that I am general manager of Oregon Hassam Paving Company, one of the complainants in the above entitled suit. That E. O. Hall is an important and material witness in behalf of the complainants in the accounting proceeding before the master in the said suit. That it is not possible to comply literally with the rules of court in procuring the evidence and taking the deposition of the said E. O. Hall, for the reason that the said suit was begun before the present rules were adopted and the reference to the master for the accounting was made by the court before the deposition of the said witness could be had. The said E. O. Hall resides in the city of Pittsburg, Pennsylvania, and by stipulation between the parties in this suit, his deposition is to be taken upon interrogatories and cross interroga-

tories before G. R. Brannon, notary public, at 547 Rosedale street in said City of Pittsburg, Pennsylvania. Good and exceptional cause for departing from the general rule exists.

J. H. CRANE.

Subscribed and sworn to before me this 19th day of May, 1916.

G. C. FRISBIE,

(Seal)

Notary Public for Oregon.

My commission expires Aug. 11th, 1916.

Filed June 5th, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on Monday, the 5th day of June, 1916, the same being the 77th judicial day of the regular March term of said court; present, the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

ORDER.

Now come the complainants above named, by Carey & Kerr, their solicitors, and present the affidavit of J. H. Crane in behalf of the complainants, together with a stipulation by which the parties have agreed to the taking of the deposition of E. O. Hall, a material witness in behalf of the complainants, at Pittsburg, Pennsylvania, for use on the accounting before the master in chancery in this suit. Good and exceptional cause existing for de-

parting from the general rule, and the court being satisfied that it is necessary to suspend the rules in relation to taking the deposition for use in this suit.

IT IS ORDERED, that the deposition may be taken in pursuance of the stipulation, without further notice, before G. R. Brannon, Notary Public, at 547 Rosedale street, in the City of Pittsburg, Pennsylvania, and used before the said master on the said accounting, and filed as a part of the evidence in this suit.

Dated June 5th, 1916.

R. S. BEAN,
District Judge.

Filed June 5th, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 18th day of August, 1916, there was duly filed in said court and cause, master's findings of fact, in words and figures as follows, to wit:

FINDINGS OF FACT.

To the Honorable Charles E. Wolverton and the Honorable Robert S. Bean, Judges of the above entitled court:

The undersigned master in chancery respectfully reports that pursuant to the directions of the decree passed in the above entitled cause on the 24th day of April, 1914, a hearing has been had for

the purpose of computing the profits of the defendant Reliance Construction Company in the work done by it which has been adjudged by the court to be an infringement of the patent owned and controlled by plaintiffs, said hearing being also directed to the ascertainment of the damages sustained by plaintiffs. The respective parties have submitted testimony in support of their contentions. This testimony, with the accompanying exhibits, is transmitted to the court with this report. After hearing the testimony and the arguments of counsel thereon, the master finds the following facts:

I.

That on the 24th day of March, 1913, the defendant Reliance Construction Company was awarded a contract by the City of Hood River for the laying of a Hassam pavement therein and pursuant to such contract the said defendant laid such pavement during the season of 1913, receiving therefor the sum of \$1.35 per yard for an aggregate area of 18,109.59 square yards.

II.

That subsequent to the letting of the said contract, but prior to the time when any work was done thereon, the said defendant was duly notified by the plaintiffs herein that the pavement covered by the specifications of the City of Hood River accompanying the said contract was a patented pavement and that the patents for the same were owned

and controlled by the plaintiffs to this suit; the said notice specified the patents by date and number and warned the defendant Reliance Construction Company against the infringement of these patents, threatening prosecution if the notice was disregarded. That the defendant Reliance Construction Company nevertheless proceeded with the said work under a mistaken impression as to the law and deliberately infringed plaintiffs' patents.

III.

That the defendant Reliance Construction Company has made a full disclosure of all of the facts in its possession relevant to the profits made by it in the said work and has submitted its books and papers to a searching examination made thereof on behalf of plaintiffs.

IV.

That the defendant Reliance Construction Company has submitted an account showing that its profits on the work aforesaid were the sum of \$1,900.34; that this account is accurate and is approved, subject to a surcharge in three respects. An error of \$37.06 was discovered therein by plaintiffs' accountant and admitted by the defendant Reliance Construction Company. The account should further be surcharged with the sum of \$125.00, being a credit claimed by Reliance Construction Company for counsel fees paid its attorneys for services rendered in the patent infringement litigation.

tion. It should further be surcharged in the sum of \$300.00, excessive overhead or general expense, the entire credit under this head claimed by the said defendant being \$604.82. The master therefore finds that the profits of Reliance Construction Company in performing the work aforesaid were \$2,-362.40.

V.

The evidence fails to show that in the absence of an infringement by the defendant Reliance Construction Company, plaintiffs or their licensee would have secured the work.

VI.

The evidence fails to disclose that there is an established royalty for the use of Hassam pavement generally recognized in the paving business and generally paid by those engaged therein.

VII.

That the sum of twenty-five cents a square yard would be a reasonable royalty for the use of Hassam pavement.

VIII.

That the damages of plaintiffs from the infringement referred to in Finding I were and are the sum of \$4,527.73.

Respectfully submitted,

WALLACE McCAMANT,

Master in Chancery.

Filed August 18th, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 18th day of August, 1916, there was duly filed in said court and cause, master's reasons for findings of fact, in words and figures as follows, to wit:

To the Honorable Charles E. Wolverton and the Honorable Robert S. Bean, Judges of the above entitled court:

The master in chancery submits the following as the grounds on which he has reached the conclusions set forth in the accompanying findings:

There has been much confusion in the decisions of the respective courts in the matter of assessing the damages of patentees arising by the infringement of their patents. The courts have consistently held that the burden of proof was on the patentee to show that he had sustained damages, and in many cases the damages awarded have been nominal where the proof failed to show that the patentee would have performed the work, or made the sale, in the absence of an infringement. The difficulty of making such proof, and the injustice which was therefore done to a patentee, has evidently impressed itself on the minds of the justices of the Federal Supreme Court, as is apparent from their decision in

Westinghouse Company vs. Wagner Company, 225 U. S. 604.

That was a case in which the record disclosed the fact that there had been profits, but that the amount thereof could not be accurately ascertained by reason of the commingling of the profits made by the infringement with other profits to which the defendant was legitimately entitled. The court applies the doctrine of confusion of goods and holds that in such a case the whole fund will be given to the patentee.

This decision was followed at a later date by the case of

Dowagiac Company vs. Minnesota Company,
235 U. S. 641.

The opinion in this later case is an interesting one for the reason that it finally adopts as the law of accounting in patent infringement cases a rule which seems to have originated in the Ninth Judicial Circuit and to have been approved at an early date by the Court of Appeals for that circuit.

In the case of

Hunt Brothers Company vs. Cassidy, 64
Fed. 585,

the trial court had instructed the jury that in the absence of proof of an established royalty for the use of a patented article the jury might find from the evidence what would be a reasonable royalty for the defendant to have paid for the use thereof, and this instruction, given by Mr. Justice McKenna when he was circuit judge for this circuit, was approved by the Court of Appeals, Judge Gilbert

writing the opinion. The question again came before Judge McKenna in

Cassidy vs. Hunt, 75 Fed 1012.

Judge McKenna reconsidered the question and reaffirmed the doctrine of the Court of Appeals in 64 Federal.

The Dowagiac case came before the Federal Supreme Court pursuant to a writ of certiorari directed to the Court of Appeals for the Eighth Circuit. The opinion of the District Court is found in a note reported in 183 Federal Reporter, at 318, and the opinion of the Court of Appeals for the Eighth Circuit is found at page 314 of the same report. The District Court expressly found, as will appear from page 319 of the report, that the evidence did not show that the patentee's machines would have been purchased but for the infringement made by the defendant. This conclusion was contested in the Court of Appeals, and that court reached the following conclusion with reference thereto:

"The master and the court below found against complainant on it and there is not only ample evidence to support their findings, but in our opinion, gathered from a careful review of the proof, they could not well have found otherwise." (Page 318.)

On the foregoing facts the Supreme Court of the United States in 235 U. S. 641, 648-649, squarely held that a fair and proper method of measuring

the damages of the patentee was to award it such sum as in the light of the evidence could be adjudged to be a reasonable royalty for the use of the patented article.

Plaintiffs contend that forty-six cents would be a reasonable royalty, it being the gross royalty of fifty cents demanded by them, less the cost price of certain service which they offered to render to those who accepted their offer and paid them fifty cents a yard for all Hassam pavement laid. The evidence shows clearly that such a royalty would absorb substantially all of the profit which could be made in laying Hassam pavement, and this circumstance would seem to the master conclusive against its allowance as a reasonable royalty. No royalty can be regarded as reasonable which would preclude any profit to the party paying it. On the other hand, the evidence of plaintiffs shows that a business well organized and economically conducted could pay a royalty of twenty-five cents per yard and still make a profit on the price ordinarily paid for smooth surface pavements in this part of the United States. The reasonableness of a royalty in the sum of twenty-five cents per yard is further supported by the circumstance that the owner of the patent, the Hassam Paving Company of Worcester, Massachusetts, exacts a payment of fifteen cents a yard from its subsidiary companies who are given the exclusive right to lay the pavement in certain territories. The Oregon Hassam Paving

Company is the owner of these exclusive rights in the State of Oregon. The testimony shows that it has been under some expense and has been at some effort to introduce Hassam pavement in the State of Oregon and that it was actively competing for business therein at the time when the contract in question was awarded to the Reliance Construction Company. These circumstances would seem to entitle it to an additional allowance, and ten cents a yard is a reasonable sum to be paid to it for its equity in the patent.

In view of the testimony of Mr. John H. Crane, found on pages 18 and 19 of the record, the master has had some little hesitation in reaching the conclusion that any royalty in excess of fifteen cents a yard could be recovered, but the master has no doubt that Mr. Crane intended to testify that the royalty of fifteen cents a yard was charged by the parent Hassam Company not to the public generally, but only to certain specified corporations to which it granted exclusive rights, and the presumption in the opinion of the master would be that the other contracts referred to by Mr. Crane are similar to Exhibit 2, the contract entered into on the 16th of July, 1909. As above indicated it is reasonable that the holder of the exclusive right to lay Hassam pavement in this territory should recover something for an infringement in view of the expense incurred in advertising and introducing Hassam.

The master has been greatly interested in the

question of overhead expense in its relation to the profits of the infringer. A careful examination of the authorities cited by the respective counsel on this question has failed to disclose any settled rule applicable to this character of an accounting. The courts very clearly hold that as against the gross profits of the infringer he is entitled to credit all expenses incurred by him in the performance of the work which constitutes an infringement. Where a corporation is organized for the sole purpose of doing the work which constitutes the infringement there is much reason for holding that its entire expense should be credited as against its gross profits, but in this case the defendant Reliance Construction Company was conducting a general contracting business of which the infringing work was a small fraction. So much of the work of the bookkeepers and other general officers of the defendant Reliance Construction Company as had to do with the performance of this particular work would undoubtedly be a proper credit, but the license fee paid to the State of Oregon, and the other general expenses of maintaining the corporation would seem to the master to be an improper credit. The method by which the defendant's bookkeeper reached his conclusion that there should be a credit of \$604.82 for overhead expenses seems to the master to be open to considerable criticism. It is difficult to determine what correction should be made in the account of profits in order to meet

the views above outlined, as the evidence is lacking in detail. It is believed that a surcharge of \$300.00 is fair to both parties.

The master has carefully examined the following cases cited by counsel for Reliance Construction Company:

Terwilliger vs. Portland, 62 Ore. 101.

Johns vs. Portland, 66 Ore 182.

Sherrett vs. Portland, 75 Ore. 449, 463.

Temple vs. Portland, 151 Pac. 724.

These cases are cited to support the contention of defendant Reliance Construction Company that if plaintiffs had been awarded the contract for the laying of Hassam pavement at Hood River, payment for the work could have been successfully resisted by the property owners interested and that therefore plaintiffs have sustained no damages by reason of the infringement. A careful examination of the ordinance of the City of Hood River inviting bids for the improvement has convinced the master that this case lies without the inhibition contained in the foregoing decisions and that if plaintiffs, or any one who was willing to pay their royalty, had been awarded the contract in question as the lowest bidders, such award would have been lawful and payment for the pavement could have been exacted.

WALLACE McCAMANT,

Master in Chancery.

Filed August 18th, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 15th day of September, 1916, there was duly filed in said court and cause, exceptions to master's report, in words and figures as follows, to wit:

EXCEPTIONS TO MASTER'S REPORT.

Now comes the defendant Reliance Construction Company and makes the following exceptions to the master's report filed in this suit:

FIRST EXCEPTION.

The defendant Reliance Construction Company excepts to that part of the master's report, paragraph IV, which sur-charges the account of defendant's profits \$300 as excessive overhead or general expense, and said defendant respectfully moves the court to hold that the entire credit under this head claimed by said defendant of \$604.82 is the correct amount of overhead expense to be charged in this accounting, and that defendant's total profits on this contract was \$2,062.40 and no more.

SECOND EXCEPTION.

Defendant Reliance Construction Company excepts to that part of the master's report, paragraphs VII and VIII whereby the master finds that twenty-five cents a square yard would be a reasonable royalty for the use of the Hassam pavement, and that plaintiff recover damages and that the damages of plaintiff on the infringement referred to in Finding I of the master's report were and are the sum of \$4,527.73.

Defendant respectfully moves the court to hold that plaintiff in this case is only entitled to recover the profits which defendant Reliance Construction Company made upon the contract which infringed the patents of plaintiff, and that such profits of defendant are \$2,062.40 and no more, and that in this case plaintiff has not suffered any damages by the infringement and is not entitled to recover any royalty for the infringement other than beyond the profits made under the contract by defendant, which are \$2,062.40 and no more.

RALPH R. DUNIWAY,
Solicitor for Defendant Reliance Construction Co.

Due and legal service of the within exceptions to master's report is hereby accepted in Multnomah County, Oregon, this day of September, 1916, by receiving a copy thereof, duly certified to as such by Ralph R. Duniway, attorney for defendant Reliance Construction Company.

CAREY & KERR,
Attorneys for Complainants.

Filed September 15th, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 15th day of September, 1916, there was duly filed in said court and cause, motion of complainants for confirmation of master's report and entry of final decree, and allowance of treble the amount of damages re-

ported by master, in words and figures as follows, to wit:

MOTION.

Now comes the complainants and move for confirmation of the report of the master and entry of final decree in the above entitled suit, and that the complainants be allowed treble the amount of damages ascertained and reported by the master in chancery in his report.

As a basis for the application for allowance of treble damages, complainants rely upon the records and files of this suit and the report of the master in chancery, particularly upon the fact that the defendants took the municipal contract for laying pavement in the City of Hood River with Hassam pavement, infringing the patents referred to in the complaint and decree, after having been repeatedly warned and notified by the complainants that they would be held for infringement and after having been offered a license by the complainants and which defendants neglected to accept.

Respectfully submitted,

CAREY & KERR,

Attorneys for Complainants.

Due service of the within motion is hereby accepted in Multnomah County, Oregon, this 15th day of September, 1916, by receiving a copy thereof, duly certified to as such by C. H. Carey, of attorneys for complainants.

RALPH R. DUNIWAY,

Attorney for Defendants.

Filed September 15th, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on Friday the 19th day of January, 1917, the same being the 64th judicial day of the regular November, 1916, term of said court; present, the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

RECORD OF HEARING OF EXCEPTIONS.

Now at this day. come the plaintiffs by Mr. Charles H. Carey, of counsel, and the defendant by Ralph R. Duniway, of counsel, whereupon this cause comes on to be heard upon the exceptions of the defendant to the report of the master in chancery, heretofore filed, and upon plaintiffs' motion to confirm said report of the master in chancery and for the allowance of treble damages, and the court having heard the arguments of counsel will advise thereof.

And afterwards, to wit, on Monday the 29th day of January, 1917, the same being the 72d judicial day of the regular November term of said court; present, the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

This cause was heard upon the exceptions to the master's report filed herein, and upon the motion to confirm said master's report, said plaintiff

appearing by Mr. Charles H. Carey, of counsel, and said defendant appearing by Ralph R. Duniway, of counsel, and now at this day the court filed herein its opinion upon said motions and directs that a decree be prepared in accordance therewith.

And afterwards, to wit, on the 29th day of January, 1917, the court rendered an oral opinion, which was taken down by the official reporter as follows:

Portland, Oregon, January 29th, 1917.

R. S. Bean, District Judge (oral):

There are two cases here for the infringement of a patent by the Hassam Paving Company against the Consolidated Contract Company, and the same company against the Reliance Contract Company. After a somewhat protracted litigation in this court and in the Court of Appeals the validity of the plaintiff's patent was finally established, whereupon the two cases were referred to the standing master to ascertain and determine the amount of damages the plaintiff was entitled to recover by reason of the infringement.

In the Consolidated Contract case the master found that the probable profits of the Consolidated Contract Company and a reasonable royalty amounted to between nineteen and twenty thousand dollars, no substantial difference between the two amounts.

A motion has been made to confirm this report and also for a decree or order trebling the damages.

Now, the statute provides that upon a decree for infringement the plaintiff shall be entitled to recover, in addition to profits, the damages it has sustained, and the court shall have power to increase such damages in its discretion by trebling the amount. This is, of course, discretionary with the court, and, as I gather from the authorities, should not be exercised unless it appears that the infringement was wilful and wanton, and that the defendant is on that account deserving punishment. Now, in this case the evidence shows that the plaintiff's patent was earnestly contested and of uncertain issue. The fact that the defendant thought proper to contest the patent and litigate the matter does not show that the infringement was wanton. As said by Judge Cox in a similar case: "It is true that this litigation has been protracted, laborious and expensive. It is true that the complainant's decree is not comprehensive when compared with the labor put forth in obtaining it, but it is thought that the defendant's case, though annoying to the complainant, was not in a legal sense wanton, unjustifiable or vexatious. The defendant unquestionably considered himself in the right and was justified in pressing his views upon the attention of the master and the court. The mere fact that a defense is unsuccessful does not warrant a court in punishing the defendant for interposing it. If he acts fairly and honestly in resisting the demands of his adversary, he does nothing worthy of censure, even

though the debatable ground is contested inch by inch. Unless the cause is one of exceptional hardship, the motion should not be granted. The limited number of reported cases upon this subject is of itself proof of the care with which the courts have exercised the discretion given by the statute."

The fact that in this case the defendant contested the patent and litigated the matter is not sufficient to justify the court in finding that its infringement was wanton or wilfull.

After the matter had been referred to the master, the defendant company or its officers either refused or neglected to produce for the examination of the plaintiff and master two of its books of account. Their conduct in that respect seems to have been inexcusable, but when the master came to ascertain the profits the Consolidated Company made from the contract, he took the evidence of the profits that the Hassam Paving Company made under similar contracts as a basis for his determination, rather than what the defendants claim to have been their profits, making a difference of nearly or quite ten thousand dollars. The master therefore gave the plaintiff all the benefits that could possibly arise from the fact that the defendants neglected to produce their books of account. So I take it that upon this record the plaintiff is not entitled to a decree trebling the damages, but for the amount found by the master.

The Casualty Company, surety for the Consoli-

dated Company under its contract with the city, is a party to the suit. Its engagement ran to the city and not to the owner of the patent, and I do not know of any rule of law that would justify the court in awarding a decree against it for damages arising out of the infringement of the patent. No authority has been cited to that effect and I have not been able to find any.

The action against the Reliance Company is similar to the one just alluded to, differing only in the fact that the profits, as found by the master, amounted to \$2,362.00, while he finds that a reasonable royalty would amount to \$4,527.00. Under the statute I take it that plaintiff is entitled to a judgment for the amount of the damages as found by the master, inasmuch as it exceeds the profits. It is argued that 25 cents a yard is an unreasonable royalty, but that was a question presented to the master, by him considered, and I think his finding is reasonably supported by the testimony, so in this case judgment will be entered in favor of the plaintiff for the amount of the royalty which was \$4,527.00.

MR. CAREY: I wish to call to the court's attention the fact that in this latter case there was a contract on the part of the surety company to indemnify the city against damages.

COURT: I suppose under those circumstances you would be entitled to a judgment over against the Casualty Company.

MR. CAREY: I should think so. I wish in the same connection to call your honor's attention to the fact that in this very consolidated case which went to the Court of Appeals, a rehearing was demanded by the appellants, the Consolidated Company and the Casualty Company, on the ground that the insurance company is not properly a party and the decree ought not to have been against it, and Judge Morrow's decision denying the rehearing stated that it was properly a party, and as a matter of fact they answered jointly and defended jointly throughout the case. I did not know but perhaps that circumstance stated to your honor might be something worthy of consideration.

COURT: I do not think the judgment could be against the Surety Company in the Consolidated case.

And afterwards, to-wit, on Saturday, the 3d day of February, 1917, the same being the 77th judicial day of the regular November term of said court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

FINAL ORDER.

This cause having come on for hearing upon the exceptions to the master's report filed by the defendants Reliance Construction Company and National Surety Company, and the application of the complainants for a confirmation of the report and

for trebling the damages reported therein; and after argument of counsel, the court having taken the same under advisement and being now fully advised;

IT IS ORDERED, that the exceptions and each of them be and the same are hereby overruled, the complainants recovering the penalty upon the exceptions provided in Rule 67; also that the application of the complainants for enhanced damages beyond the amount found by the master in his findings of fact and report be denied; also that the findings of fact and report of the master in chancery be in all things confirmed, and that the damages sustained by the complainants from the infringements of their patents described in the complaint are the sum of forty-five hundred twenty-seven and 73/100 dollars (\$4527.73), and that the profits of the Reliance Construction Company in the infringements aforesaid are twenty-three hundred sixty-two and 40/100 dollars (\$2362.40).

IT IS FURTHER ORDERED and DECREED that the complainants have and recover of and from the said defendants and each of them the sum of forty-five hundred twenty-seven and 73/100 dollars (\$4527.73) damages as aforesaid, together with their costs and disbursements to be taxed.

Dated February 3, 1917.

R. S. BEAN,
Judge.

Filed February 3, 1917.

G. H. MARSH,
Clerk.

And afterwards, to-wit, on the 3d day of February, 1917, there was duly filed in said court and cause, petition of Reliance Construction Company for rehearing, in words and figures as follows, to-wit:

PETITION FOR REHEARING.

Comes now the Reliance Construction Company, and respectfully petitions the court to grant a rehearing of this cause upon the following special matter or cause on which said rehearing is applied for, which is apparent upon the face of the record:

FIRST.

The court in confirming the report of the master in this cause against the Reliance Construction Company, has overlooked or not given proper consideration to the fact that it is affirmatively established in this case and found by the master as follows:

"The evidence fails to show that in the absence of an infringement by the defendant Reliance Construction Company, plaintiffs or their licensee, would have secured the work."

The court has overlooked that there is no evidence to support the finding of fact by the master as follows:

“That the damages of plaintiffs for the infringement referred to in finding one were and are the sum of \$4527.73.”

The court has overlooked that it is found in finding one, and is established by the evidence, that the defendant Reliance Construction Company took this contract for the sum of \$1.35 per yard, and that it cost the Reliance Construction Company, and would have cost any one else, more than \$1.20 per yard to lay this Hassam pavement in Hood River.

Also the court has overlooked the undisputed testimony that Hood River would not have laid Hassam pavement unless the price had been a very great deal lower than the lowest price for which the Hassam Paving Company or any of its licensees, would lay Hassam pavement, and that the City of Hood River would have awarded its work for concrete pavement to defendant Reliance Construction Company at \$1.30 per yard if the Reliance Construction Company had not bid \$1.35 per yard for Hassam pavement under the mistaken belief that Hassam pavement was an unpatented pavement.

Therefore it follows that there is absolutely no evidence, absolutely no legal reason stated or found by the master, nor stated by the court why a decree should be rendered that the damages of plaintiffs for the infringement referred to in finding one were and are the sum of \$4527.73, or any

other or greater sum than the profits which were made by the defendant Reliance Construction Company, or which could have been made by any competent person laying this Hassam pavement in Hood River, which the undisputed evidence shows do not exceed, and could not exceed the sum of \$2062.40, the profits made by the Reliance Construction Company and which profits the Reliance Construction Company concedes the decree should be against it in that amount.

SECOND.

The court, in confirming the report of the master in this case, has overlooked, or not given proper consideration to the fact, that it is established by the undisputed evidence, and the master has found as follows:

“The evidence fails to disclose that there is an established royalty for the use of Hassam pavement generally recognized in the paving business and generally paid by those engaged therein.”

Also the court has overlooked that there is absolutely no evidence in this case to establish or support the finding of the master:

“That the sum of 25c per square yard would be a reasonable royalty for the use of Hassam pavement”

in this case at Hood River.

The court has overlooked that in this case in Hood River where there would have been no Has-

sam pavement laid unless a bid of \$1.35 per square yard had been submitted, but that Hood River would have laid concrete pavement, a similar pavement, at \$1.30 per square yard, that it is unreasonable for the master to find and the court to hold, that 25 cents per square yard is a reasonable royalty when such royalty takes away from the infringer all the profit which he made by means of the infringement, and inflicts a punishment or fine in the sum of about twenty-five hundred dollars in addition to the profits made by the infringement.

The court has overlooked the fact that no text book can be cited, that no authority can be cited, that no reason has been given by the master, and that no reason has been given by the court which tends to uphold or establish that a reasonable royalty in a given case can be more than double the profits made by the infringement.

The decision in this Reliance Construction Company case is absolutely different from any other decision rendered in any other patent case. The decision rendered in this Reliance Construction Company case is in direct violation of the reasoning and the facts involved in each and every case which has heretofore ordered a recovery of reasonable royalty.

However, the court in this case does not file any written opinion, nor make any precedent for the benefit of the public and the profession showing why this decision should be awarded in the District

Court of the United States for the District of Oregon.

The Reliance Construction Company respectfully urges of the court that it should not be decreed to pay a reasonable royalty which is twenty-five hundred dollars larger than the substantial profits of over two thousand dollars which it made by the infringement, without at least the court giving the matter sufficient consideration for court to file an opinion attempting to state some principle of law or equity upon which such a decree can be rendered in this case, and make a precedent to be published in the reports of the decisions of this court for use in other cases.

The Reliance Construction Company respectfully urges that it has cited reasons and authorities demonstrating why such a finding and decree is inequitable, unjust and in violation of the law and should not be rendered.

THIRD.

The court, in announcing its decision and overruling the exceptions and confirming the findings of the master in chancery, has inadvertently or erroneously announced that it would render a decree against not only the defendant, Reliance Construction Company, the infringer, but against the City of Hood River, a municipal corporation, and the National Surety Company, a corporation, for the same amount, and this defendant respectfully calls the attention of the court to the fact

that the record shows that there is no testimony introduced, nor any finding by the master, that either defendant City of Hood River, or defendant National Surety Company, have received, or made, or which have arisen or accrued to them, or either of them, any profits or gains or advantages by the manufacture or use or sale of said pavements and artificial structures in violation of said letters patent, or that the complainants have suffered damages resulting from said infringement by either one of said defendants; and the court has overlooked that in the decree it was ordered and adjudged as follows:

“And it is further Ordered, Adjudged and Decreed that the complainants do recover of the defendants the profits, gains and advantages which the said defendants have received or made or which have arisen or accrued to them, or either of them, by the manufacture, use or sale of the said pavements and artificial structures in violation of the said letters patent since the 1st day of May, 1913, and that the complainants do recover the damages resulting from said infringements.”

Also the court has overlooked that the master, by the decree in this case, was directed as follows:

“To ascertain, take and state, and report to the court, an account of the number of pavements and structures embodying the said inventions and improvements and each thereof, described and se-

cured in the said letters patent, made, used or sold by the said defendants, and also the gains, profits and advantages which the said defendants have received or which have arisen or occurred to them or either of them since the 1st day of May, 1913, from infringing the said exclusive rights of the said complainants by the manufacture, use or sale of the said inventions and improvements in the said letters patent, and the damages which the complainants have suffered by said infringements."

Also the court has overlooked that the master, in making his report, limited his findings of fact in accordance with the evidence to the Reliance Construction Company.

Also the court has overlooked that before any finding or decree could be rendered against either the City of Hood River, a municipal corporation, or the National Surety Company, a corporation, upon the bond executed by it to indemnify the City of Hood River against any damages by reason of the infringement of any patents, that an action must be brought against the City of Hood River, a municipal corporation, or the National Surety Company, a corporation, or against both of them, upon said indemnity bond, and that this court is without jurisdiction or power to render a decree in this case against the defendant City of Hood River, a municipal corporation, or the defendant National Surety Company, a corporation, when it

is established by the evidence that neither one of said defendants have received or made any profits or gains or advantages by the manufacture, use of, or sale of said pavements and artificial structures in violation of said letters patent since the 1st day of May, 1913; and also it appears that there has not arisen or accrued to either one of said defendants, the City of Hood River, a municipal corporation, or National Surety Company, a corporation, nor has there accrued to either one of them any profits or gains or advantages by the manufacture or use or sale of said pavements and artificial structures in violation of said letters patent.

This defendant respectfully shows that to render any such decree for any amount against the defendant City of Hood River, a municipal corporation, or the defendant National Surety Company, a corporation, is to render a decree without any evidence or law to support it in any way, shape, manner or form. The City of Hood River and the National Surety Company ought to be allowed to defend an action and be heard on the measure of damages and amount of recovery before any recovery is permitted against either one of said defendants because of the indemnity bond.

CONCLUSION.

Upon each of the special matters or causes set forth herein, this defendant Reliance Construc-

tion Company, respectfully applies for a rehearing of this cause.

RALPH R. DUNIWAY,
Counsel for Reliance Construction
Company, Defendant.

Filed February 3, 1917.

G. H. MARSH, Clerk.

And afterwards, to-wit, on Monday, February 19th, 1917, the same being the 90th judicial day of the regular November term of said court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER DENYING REHEARING.

This cause was heard upon the motion of the defendants for an order amending the final decree heretofore entered on February 3, 1917, and for a rehearing herein, and was argued by Mr. Chas. H. Carey, of counsel for the plaintiffs, and by Ralph R. Duniway, of counsel for the defendants, on consideration whereof

IT IS ORDERED AND ADJUDGED that said motion be and the same is hereby denied.

And afterwards, to-wit, on the 19th day of February, 1917, there was duly filed in said court and cause, an opinion on petition for rehearing in words and figures as follows, to-wit:

OPINION DENYING REHEARING.

Portland, Oregon, Monday, February 19, 1917.

R. S. BEAN, District Judge:

There are two questions involved. First, whether the master's estimate of the damages caused by the infringement on the basis of twenty-five cents a yard is supported by the testimony, and second, whether a decree should go against the defendants city and surety company jointly with the principal contractor for the amount recovered.

The findings of a master in a case of this kind will not be disturbed by a reviewing court except on a strong showing that they were erroneous, even if it may appear that there was evidence which would have justified a different conclusion, and although the court may not approve the reasoning by which the master reached his decision.

Prior to the Act of July 8, 1870, courts of equity in suits for the infringement of a patent could award a decree only for the profits made by the infringer and the damages, if any, sustained by the patentee must be recovered at law. By that statute, however, it is provided that in such a case the court shall assess or cause to be assessed under its direction the damages sustained by the plaintiff, as well as the profits to be accounted for by the defendant, and it has been held that if such damages exceed the profits the plaintiff is entitled to a decree therefor, subject to the power of the

court to increase it as in case of verdicts. (*Root v. Ry. Co.*, 105 U. S. 189.)

It is therefore necessary to ascertain the damages to the complainant on account of the infringement as well as the profits made by the infringer. Now, the exclusive right conferred by a patent is property. An infringement is the tortious taking of that property. The measure of damages therefor is ordinarily the value of the thing taken. Where the patentee has pursued a general course of granting a license to all who may desire to use or manufacture the patented article for a uniform and established royalty, such royalty forms, in the absence of a showing as to other damages, a reasonable rule for estimating the damages in case of an infringement. Where, however, there is no established royalty, the courts are not agreed as to the measure of damages. In one instance it has been held that where, as here, a patentee himself or through his authorized agent manufactures a patented article and thus maintains a close monopoly, so that those who desire to use it can purchase only from him or such agent, he is entitled to recover as damages for an infringement the difference between the cost of the manufacture and his established selling price. (*Ross v. Hirsh*, 94 Fed. 177.) In other cases it is ruled that it is proper in such a case to show by general evidence what would have been a reasonable royalty under all the circumstances, and take

that as a measure of damages. (*Dowagiac Mfg. Co. v. Plow Co.*, 235 U. S. 648.) The master, for reasons not necessary to state, adopted the latter course and found twenty-five cents a yard to be such royalty, and in my judgment his conclusions find support in the testimony. There is evidence that the patentee charges its subsidiary companies in various parts of the Union for the exclusive right to lay its pavement within a given territory fifteen cents a yard, and that the average profits of the complainant, one of such subsidiary companies having the right to lay such pavement in Oregon, covering a series of years has been forty-five cents a yard. It also appears that prior to the making of the contract between the City of Hood River and the principal contractor, the complainant made a price to the city and other municipalities of fifty cents a yard for the right to use its patented pavement, it to supply certain machinery and employes, which would have cost it about five cents a yard.

The master was of the opinion that under the circumstances neither of these facts should be adopted as the measure of a reasonable royalty. They were, however, evidence for his consideration and support his findings that twenty-five cents is such a royalty, which in my judgment is as favorable to the defendants as they can reasonably ask or expect.

Sustaining the motion of complainant to con-

firm must not be deemed a judicial determination that complainant's patented pavement can be laid without its authority upon the payment of twenty-five cents a yard, or that such sum is in all cases sufficient damages for an infringement.

The remaining question is whether decree should go against the city and the surety company. They are both parties to the suit and joined with the other defendant in the answer and defense, and unsuccessfully challenged the validity of the patent. The ordinance, contract and specifications under which the work was performed called for Hassam pavement, known by all the defendants to be then covered by letters patent. The contractor agreed to hold the city harmless against all royalties and fees on account of an infringement. The surety company not only stipulated with the city for the faithful performance of such contract, but gave it a special bond agreeing to indemnify it against loss or damage which it might suffer growing out of any suit which might be instituted against it within a stipulated time on account of an infringement. The city and surety company thus knowingly and intentionally aided and abetted the infringement and thereby became joint tortfeasors with the principal contractor, for, as said by Judge Taft, speaking for the court in *T. H. Elec. Co. v. Ohio Brass Co.*, (80 Fed. 721) :

“An infringement of a patent is a tort analogous to trespass or trespass on the case. From the

earliest time all who took part in trespass either by actual participation therein, or by aiding and abetting it have been held to be jointly and severally liable for the injury inflicted. There must be some concert of action between him who does the injury and him who is charged with aiding and abetting before the latter can be held liable. When that is present, however, the joint liability of both the principal and the accomplice has been invariably enforced. If this healthful rule is not to apply to trespass upon patent property, then indeed the protection which is promised by the constitution and laws of the United States to inventors is a poor sham." See also 224 Fed. 452, *N. Y. Scaffolding Co. v. Whitney*.

It was accordingly held in *Henry v. Dick* (224 U. S. 1), that one who furnished material to the purchaser of a patented article for use by him in violation of a license restriction with knowledge that it was to be so used was guilty of a contributory infringement as an aider and abetter. In *Risdon v. Trent* (92 Fed. 375), a member of a firm which made plans for the construction of mining machinery and then superintended its erection was held to be guilty of infringement although he neither personally made nor used the machine.

Elizabeth v. Pavement Co. (97 U. S. 140), was a suit against a contractor and the city for the infringement of a patent for a pavement, decided prior to the Act of Congress of 1870. The court,

while holding that the city was not liable for profits because it made no profits, said that "it made itself liable to damages undoubtedly for using the patent pavement of Nicolson. But damages are not sought or at least are not recoverable in this suit. Profits only as such can be recovered therein."

This statement is authority for the conclusion that the city is liable for damages which may now be awarded in a suit in equity. See also *Asbestine Tiling Co. v. Hepp*. (39 Fed. 324). Judge Deady, sitting in this court, held that where a city authorized a contractor to lay a sewer and in so doing the contractor infringes upon a patent, the city is liable in damages but not for profits for such infringement, the same as a private corporation. (See also page 10503, U. S. Compiled Statutes, 1916.)

Indeed, under any other holding the protection afforded by the patent law to inventors would be, as said by Judge Taft in *Elec. Co. v. Brass Works*, *supra*, "a poor sham," for it would be possible for a city to practically destroy the patent protection by awarding contracts to irresponsible or impetunious corporations or individuals.

The petition is therefore denied. •

Filed February 19, 1917.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 21st day of March, 1917, there was duly filed in said court and cause, petition for appeal of Reliance Construction Company in words and figures as follows, to-wit:

PETITION FOR APPEAL RELIANCE CON-
STRUCTION COMPANY.

To the Hon. CHAS. E. WOLVERTON and HON.
ROBERT S. BEAN, Judges of the above en-
titled court:

The Reliance Construction Company, a corporation, feeling itself aggrieved by the decree made and entered in this cause on the 3d day of February, 1917, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reason specified in the assignment of errors which is filed herewith, and it prays that its appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco, Cal.; and your petitioner further prays that the proper order touching the security to be required of it to perfect its appeal be made, and desiring to suprsede the execution of the decree, petitioner here tenders bond in such amount as the court may require for such pur-

pose, and prays that with the allowance of the appeal, a supersedeas be issued.

RALPH R. DUNIWAY,
Solicitor for Reliance Construction Co.

The appeal is allowed and shall operate as a supersedeas upon the petitioner filing a bond in the sum of \$5,500.00 with sufficient sureties to be conditioned as required by law.

CHAS. E. WOLVERTON,
Judge of the District Court of the United States for
the District of Oregon.

Due and legal service of the within petition of appeal is hereby accepted in Multnomah County, Oregon, this 21st day of March, 1917, by receiving a copy thereof, certified to as such by Ralph R. Duniway, attorney for Reliance Construction Company.

CAREY & KERR,
Attorneys for Plaintiffs.

Filed March 21, 1917.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 31st day of March, 1917, there was duly filed in said court and cause, petition for an appeal by the City of Hood River, in words and figures as follows, to-wit:

PETITION FOR APPEAL, CITY OF
HOOD RIVER.

To the HON. CHAS. E. WOLVERTON, and HON.
ROBERT S. BEAN, Judges of the above en-
titled court:

The City of Hood River, a municipal corpora-
tion, feeling itself aggrieved by the decree made
and entered in this cause on the 3d day of Febru-
ary, A. D. 1917, does hereby appeal from said
decree to the Circuit Court of Appeals for the
Ninth Circuit, for the reason specified in the as-
signment of errors which is filed herewith, and it
prays that its appeal be allowed and that citation
issue as provided by law, and that a transcript of
the record, proceedings and papers upon which said
decree was based, duly authenticated, may be sent
to the Circuit Court of Appeals for the Ninth Cir-
cuit sitting at San Francisco, California; and
your petitioner further prays that the proper order
touching the security to be required of it to per-
fect its appeal be made, and desiring to supersede
the execution of the decree, petitioner here tenders
bond in such amount as the court may require for
such purpose and prays that with the allowance
of the appeal, a supesedeas be issued.

RALPH R. DUNIWAY,
Solicitor for City of Hood River.

The appeal is allowed and shall operate as a
supersedeas upon the petitioner filing a bond in

the sum of \$5,500.00 with sufficient sureties to be conditioned as required by law.

CHAS. E. WOLVERTON,
Judge of the District Court of the United States for
Oregon District.

Due and legal service of the within petition of appeal is hereby accepted in Multnomah County, Oregon, this 31st day of March, 1917, by receiving a copy thereof, certified to as such by Ralph R. Duniway, attorney for City of Hood River.

CAREY & KERR,
Attorneys for Plaintiffs.

Filed March 31, 1917.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 31st day of March, 1917, there was duly filed in said court and cause, petition for an appeal by National Surety Company, in words and figures as follows, to-wit:

PETITION FOR APPEAL, NATIONAL SURETY
COMPANY.

To the HON. CHAS. E. WOLVERTON, and HON.
ROBERT S. BEAN, Judges of the above en-
titled court:

The National Surety Company, a corporation, feeling itself aggrieved by the decree made and entered in this cause on the 3d day of February, A. D. 1917, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Cir-

cuit, for the reason specified in the assignment of errors which is filed herewith, and it prays that its appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco, California; and your petitioner further prays that the proper order touching the security to be required of it to perfect its appeal be made, and desiring to supersede the execution of the decree, petitioner here tenders bond in such amount as the court may require for such purpose, and prays that with the allowance of the appeal, a supersedeas be issued.

RALPH R. DUNIWAY,
Solicitor for National Surety Company.

The appeal is allowed and shall operate as a supersedeas upon the petitioner filing a bond in the sum of \$5,500.00 with sufficient sureties to be conditioned as required by law.

CHAS. E. WOLVERTON,
Judge of the District Court of the United States for
Oregon District.

Due and legal service of the within petition of appeal is hereby accepted in Multnomah County, Oregon, this 31st day of March, 1917, by receiving

a copy thereof, certified to as such by Ralph R. Duniway, attorney for National Surety Company.

CAREY & KERR,
Attorneys for Plaintiffs.

Filed March 31, 1917.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 21st day of March, 1917, there was duly filed in said court and cause, assignment of errors of Reliance Construction Company, in words and figures as follows, to-wit:

ASSIGNMENT OF ERRORS OF RELIANCE
CONSTRUCTION COMPANY.

Now on this 21st day of March, A. D. 1917, came the defendant Reliance Construction Company, by its solicitor, Ralph R. Duniway, and says that the decree entered in the above cause on the 3d day of February, A. D. 1917, is erroneous and unjust to defendant Reliance Construction Company.

First: Because said decree overrules the first exception of Reliance Construction Company to that part of the master's report, paragraph IV which surcharges the account of defendant, Reliance Construction Company, profits as excessive overhead or general expense, instead of holding as requested by said Reliance Construction Company, that the entire credit under this head claimed by

said defendant of \$604.82 is the correct amount of overhead expense to be charged in this accounting, and that said Reliance Construction Company's total profit on this contract was \$2,062.40 and no more.

Second: Because said decree overrules the second exception of Reliance Construction Company to that part of the master's report, paragraphs VII and VIII whereby the master finds that 25 cents a square yard would be a reasonable royalty for the use of the Hassam pavement, and that plaintiffs recover damages and that the damages of plaintiffs on the infringement referred to in finding I of the master's report were and are the sum of \$4,527.73, instead of finding no damages to complainants.

Third: Because said decree confirms said master's report and refuses to decree as moved by the Reliance Construction Company that plaintiffs in this case are only entitled to recover the profits which defendant Reliance Construction Company made upon the contract which infringed the patents of plaintiffs, and that such profits of defendant Reliance Construction Company are \$2,062.40 and no more, and that in this case plaintiffs have not suffered any damages by the infringement and are not entitled to recover any royalty for the infringement other or beyond the profits made under the contract by the defendant Reliance Construction Company, which are \$2,062.40 and no more.

Fourth: Because the said decree confirms the findings of fact and report of the master in chancery in finding that the damages of plaintiffs for the infringement by the defendant Reliance Construction Company referred to in finding one, were and are the sum of \$4,527.73, instead of finding no damages to complainants.

Fifth: Because said decree confirms the findings of fact and report of the master in chancery in finding that the profits of the Reliance Construction Company in the infringements aforesaid are \$2,362.40, instead of \$2,062.40 and no more.

Sixth: Because said decree orders and decrees that complainants have and recover of and from the Reliance Construction Company the sum of \$4,527.73 damages, instead of \$2,062.40 profits, together with their costs and disbursements to be taxed.

Seventh: Because said decree orders and decrees that complainants have and recover of and from said defendants and each of them, the sum of \$4,527.73 damages as aforesaid, together with their costs and disbursements to be taxed, thereby entering a decree against defendant City of Hood River, a municipal corporation, for \$4,527.73 damages together with plaintiffs' costs and disbursements to be taxed, when said City of Hood River had not been brought before the master in chancery to account in any way, nor was it required to file any statement of what it had done, nor was there

any evidence of any kind introduced against the City of Hood River, nor any claim made against the City of Hood River before the master in chancery that it had damaged the complainants or made any profits, and the master in chancery did not make any findings of fact or conclusions of law, or report against the City of Hood River in any amount, nor was the City of Hood River summoned before the District Court in any way, nor did it appear before said District Court in any way, nor was it given any hearing in any way before the decree was rendered against it, and said decree casts the City of Hood River in judgment for \$4,527.73 damages, together with costs and disbursements, without it being summoned into court in any way or being given a hearing in any way, and said decree is an attempt to deprive said City of Hood River of its property without due process of law in violation of the constitution of the United States of America.

Eighth: Because said decree orders and decrees that complainants have and recover of and from said defendants and each of them, the sum of \$4,527.73 damages as aforesaid, together with their costs and disbursements to be taxed, thereby entering a decree against defendant National Surety Company, a corporation, for \$4,527.73 damages together with plaintiffs' costs and disbursements to be taxed, when said National Surety Company was not required to file any statement of what it

had done, nor was there any evidence of any kind introduced against the National Surety Company, nor any claims made against the National Surety Company before the master in chancery that it had damaged the complainants or made any profits, and the master in chancery did not make any findings of fact or conclusions of law or report against the National Surety Company in any amount, and there is neither allegation nor evidence to support said decree against the National Surety Company in any amount, nor was the National Surety Company given any hearing before the District Court before it was cast in judgment.

WHEREFORE, defendant Reliance Construction Company prays that the decree be reversed, and the District Court directed to enter a decree against the Reliance Construction Company only for the sum of \$2,062.40 profits, and no more, being the profits which said defendant made by the infringement, together with the costs and disbursements incurred by the complainants up to the time of entering the decree in the District Court, and that this defendant recover its costs and disbursements incurred on the appeal; or if the Court of Appeals does not find the above is the proper decree to be rendered on the record, that then the Court of Appeals reverse the decree of the District Court and render a proper decree on the record.

RALPH R. DUNIWAY,
Solicitor for Reliance Construction Co.

Due and legal service of the within Assignment of Errors is hereby accepted in Multnomah County, Oregon, this 21st day of March, 1917, by receiving a copy thereof, certified to as such by Ralph R. Duniway, attorney for Reliance Construction Company.

CAREY & KERR,
Attorneys for Plaintiff.

Filed March 21, 1917.

G. H. MARSH ,Clerk.

And afterwards, to-wit, on the 31st day of March, 1917, there was duly filed in said court and cause, assignment of errors of City of Hood River in words and figures as follows, to-wit:

ASSIGNMENT OF ERRORS OF CITY OF
HOOD RIVER.

Now on this day of March, A. D. 1917, came the defendant, City of Hood River, a municipal corporation, by its solicitor, Ralph R. Duniway, and says that the decree entered in the above cause on the 3d day of February, A. D. 1917, is erroneous and unjust to defendant, City of Hood River.

First: Because said decree orders and decrees that complainants have and recover of and from said defendants, and each of them, the sum of \$4,527.73 damages as aforesaid, together with their costs and disbursements to be taxed, thereby entering a decree against defendant City of Hood

River, a municipal corporation, for \$4,527.73 damages, together with plaintiffs' costs and disbursements to be taxed, when said City of Hood River had not been brought before the master in chancery to account in any way, nor was it required to file any statement of what it had done, nor was there any evidence of any kind introduced against the City of Hood River, nor any claim made against the City of Hood River before the master in chancery that it had damaged the complainants or made any profits, and the master in chancery did not make any findings of fact or conclusions of law, or report against the City of Hood River in any amount, nor was the City of Hood River summoned before the District Court in any way, nor did it appear before said District Court in any way, nor was it given any hearing in any way before the decree was rendered against it, and said decree casts the City of Hood River in judgment for \$4,527.73 damages, together with costs and disbursements, without it being summoned into court in any way or being given a hearing in any way, and said decree is an attempt to deprive said City of Hood River of its property without due process of law in violation of the constitution of the United States of America.

Second: Because said City of Hood River has not damaged complainants in any amount.

WHEREFORE, defendant City of Hood River, prays that the decree be reversed, and the District

Court directed to enter a decree that this defendant City of Hood River recover its costs and disbursements incurred on the appeal; or if the Court of Appeals does not find that the above is a proper decree to be rendered on the record, that then the Court of Appeals reverse the decree of the District Court and render a proper decree on the record.

RALPH R. DUNIWAY,
Solicitor for City of Hood River.

Due and legal service of the within Assignment of Errors is hereby accepted in Multnomah County, Oregon, this day of, 1917, by receiving a copy thereof, certified to as such by Ralph R. Duniway, attorney for City of Hood River.

CAREY & KERR,
Attorneys for Plaintiff.

Filed March 31, 1917.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 31st day of March, 1917, there was duly filed in said court, assignment of errors of National Surety Company, in words and figures as follows, to-wit:

ASSIGNMENT OF ERRORS OF NATIONAL
SURETY COMPANY.

Now on this day of March, A. D. 1917, came the defendant, National Surety Company, a corporation, by its solicitor, Ralph R. Duniway, and says that the decree entered in the above cause

on the 3d day of February, A. D. 1917, is erroneous and unjust to defendant, National Surety Company.

First: Because said decree orders and decrees that complainants have and recover of and from said defendants and each of them, the sum of \$4,527.73 damages as aforesaid, together with their costs and disbursements to be taxed, thereby entering a decree against the defendant, National Surety Company, a corporation, for \$4,527.73 damages together with plaintiffs' costs and disbursements to be taxed, when said National Surety Company was not required to file any statement of what it had done, nor was there any evidence of any kind introduced against the National Surety Company, nor any claims made against the National Surety Company before the master in chancery that it had damaged the complainants or made any profits, and the master in chancery did not make any findings of fact or conclusions of law or report against the National Surety Company in any amount, and there is neither allegation nor evidence to support said decree against the National Surety Company in any amount, nor was the National Surety Company given any hearing before the District Court before it was cast in judgment.

Second: Because said National Surety Company has not damaged the complainants in any amount.

WHEREFORE, defendant National Surety

Company prays that the decree be reversed, and the District Court directed to enter a decree that this defendant National Surety Company recover its costs and disbursements incurred on the appeal; or if the Court of Appeals does not find that the above is a proper decree to be rendered on the record, that then the Court of Appeals reverse the decree of the District Court and render a proper decree on the record.

RALPH R. DUNIWAY,
Solicitor for National Surety Company.

Due and legal service of the within Assignment of Errors is hereby accepted in Multnomah County, Oregon, this 31st day of March, 1917, by receiving a copy thereof, certified to as such by Ralph R. Duniway, attorney for National Surety Company.

CAREY & KERR,
Attorneys for Plaintiffs.

Filed March 31, 1917.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 31st day of March, 1917, there was duly filed in said court and cause, bond on appeal of Reliance Construction Company, in words and figures as follows, to-wit:

BOND OF RELIANCE CONSTRUCTION
COMPANY.

Know All Men By These Presents, That we, Reliance Construction company, a corporation as

principal, and Joseph Paquet, and M. G. Thorsen and A. Giebisch and F. Joplin as sureties, acknowledge ourselves to be jointly indebted to the Hassam Paving Company, a corporation, and Oregon Hassam Paving Company, a corporation, appellees in the above cause, in the sum of fifty-five hundred dollars, conditioned that:

Whereas, on the 3d day of February, A. D. 1917, in the District Court of the United States for the District of Oregon, in a suit depending in that court wherein Hassam Paving Company, a corporation, and Oregon Hassam Paving Company, a corporation, were complainants, and Reliance Construction Company, a corporation, City of Hood River, a municipal corporation, and National Surety Company, a corporation, were defendants, numbered on the equity docket as No. 5966, and wherein a decree was rendered against the said Reliance Construction Company and also against the other defendants, and the said Reliance Construction Company having obtained an appeal to the Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the clerk of the court to reverse the said decree, and a citation directed to the said Hassam Paving Company, a corporation, and to Oregon Hassam Paving Company, a corporation, citing and admonishing them to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the City of San Francisco,

State of California, on the 30th day of April, A. D. 1917 next:

Now, if the said Reliance Construction Company shall prosecute its appeal to effect and answer all damages and costs if it fails to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

RELIANCE CONSTRUCTION COMPANY,

By Joseph Paquet, President.

By F. Joplin, Secretary.

(Principal)

JOSEPH PAQUET,

M. G. THORSEN,

ANTON GIEBISCH,

F. JOPLIN,

(Sureties)

This bond is hereby approved, March 31, 1917.

CHAS. E. WOLVERTON,

Judge of District Court of the United States for Oregon District.

Filed March 31, 1917.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 31st day of March, 1917, there was duly filed in said court and cause, bond on appeal of City of Hood River, in words and figures as follows, to-wit:

BOND OF CITY OF HOOD RIVER.

Know All Men By These Presents, That we,

City of Hood River, a municipal corporation, as principal, and Joseph Paquet, and M. G. Thorsen and A. Giebisch and F. Joplin as sureties, acknowledge ourselves to be jointly indebted to the Hassam Paving Company, a corporation, and Oregon Hassam Paving Company, a corporation, appellees in the above cause, in the sum of fifty-five hundred (\$5500) dollars, conditioned that:

Whereas, on the 3d day of February, A. D. 1917, in the District Court of the United States for the District of Oregon, in a suit depending in that court wherein Hassam Paving Company, a corporation, and Oregon Hassam Paving Company, a corporation, were complainants, and Reliance Construction Company, a corporation, City of Hood River, a municipal corporation, and National Surety Company, a corporation, were defendants, numbered on the equity docket as No. 5966, and wherein a decree was rendered against the said City of Hood River and also against the other defendants, and the said City of Hood River having obtained an appeal to the Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the clerk of the court to reverse the said decree, and a citation directed to the said Hassam Paving Company, a corporation, and to Oregon Hassam Paving Company, a corporation, citing and admonishing them to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the City of San Fran-

cisco, State of California, on the 30th day of April, A. D. 1917 next.

Now, if the said City of Hood River shall prosecute its appeal to effect and answer all damages and costs if it fails to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

CITY OF HOOD RIVER,

By H. L. Dumbe, Mayor.

Attest:

N. L. HORN,

City Recorder.

(Seal)

JOSEPH PAQUET,

M. G. THORSEN,

ANTON GIEBISCH,

F. JOPLIN,

(Sureties)

This bond is hereby approved, March 31, 1917.

CHAS. E. WOLVERTON,

Judge of the District Court of the United States for Oregon District.

Filed March 31, 1917.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 31st day of March, 1917, there was duly filed in said court, bond on appeal of National Surety Company, in words and figures as follows, to-wit:

BOND OF NATIONAL SURETY COMPANY.

Know All Men By These Presents, That we, National Surety Company, a corporation, as principal, and Joseph Paquet, and M. G. Thorsen and A. Giebisch and F. Joplin as sureties, acknowledge ourselves to be jointly indebted to the Hassam Paving Company, a corporation, and Oregon Hassam Paving Company, a corporation, appellees in the above cause, in the sum of fifty-five hundred dollars, conditioned that:

Whereas, on the 3d day of February, A. D. 1917, in the District Court of the United States for the District of Oregon, in a suit depending in that court wherein Hassam Paving Company, a corporation, and Oregon Hassam Paving Company, a corporation, were complainants, and Reliance Construction Company, a corporation, City of Hood River, a municipal corporation, and National Surety Company, a corporation, were defendants, numbered on the equity docket as No. 5966, and wherein a decree was rendered against the said National Surety Company and also against the other defendants, and the said National Surety Company having obtained an appeal to the Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the clerk of the court to reverse the said decree, and a citation directed to the said Hassam Paving Company, a corporation, and to Oregon Hassam Paving Company, a corporation, citing and admonishing them to be and

appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the City of San Francisco, State of California, on the 30th day of April, A. D. 1917 next;

Now, if the said National Surety Company shall prosecute its appeal to effect and answer all damages and costs if it fails to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

NATIONAL SURETY COMPANY,

(Seal) By Harrison Allen,
Resident Vice-President.
(Principal.)

JOSEPH PAQUET,
M. G. THORSEN,
ANTON GIEBISCH,
F. JOPLIN.

(Sureties)

This bond is hereby approved, March 31, 1917.

CHARLES E. WOLVERTON,
Judge of District Court of the United States for
Oregon District.

Filed March 31, 1917.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 28th of June, 1917, there was duly filed in said court and cause, statement of the evidence and proceedings, in words and figures as follows:

*In the District Court of the United States for the
District of Oregon.*

HASSAM PAVING COMPANY, a corporation, and
OREGON HASSAM PAVING COMPANY, a
corporation,

Respondents,

vs.

RELIANCE CONSTRUCTION COMPANY, a cor-
poration; CITY OF HOOD RIVER, a municipal
corporation, and NATIONAL SURETY COM-
PANY, a corporation,

Appellants.

No. 5966.

STATEMENT OF THE EVIDENCE AND
PROCEEDINGS.

Pursuant to the decree rendered in the above entitled court and cause, the accounting directed to be taken before the master in chancery was regularly set for hearing on the 26th day of April, 1916, at the hour of 10 o'clock A. M., but notice was given the master in chancery on the 26th day of April, 1916, that Mr. Jesse Stearns and Mr. John H. Hall had withdrawn as solicitors for the defendant Reliance Construction Company; and thereupon, on application of complainants, a master's summons was issued, directed to Reliance Construction Company and National Surety Company, defendants, and was served by the marshal upon the National Surety Company on April 26, 1916, and

on the Reliance Construction Company April 27, 1916, which is as follows:

The undersigned as master in chancery, having been appointed to state the account authorized by the decree herein, you are required and directed to be and appear before me at my office in the Northwestern Bank Building in the City of Portland, Oregon, on the third day of May, 1916, at 10 o'clock in the forenoon, then and there to render to me, upon the oath or oaths of such one or more of you, or either of you, or the officers or agents of you or either of you as shall have the most certain and full knowledge of the same, an account and statement of all profits made by you upon any and all infringements of the patents described in the decree in this suit, and then and there produce all the books and papers in your possession or in the possession of either of you, which relate to the contract referred to in the bill of complaint, with the City of Hood River, Oregon, upon which the infringement complained of occurred, and all books and vouchers in the possession of you or either of you which show the cost of labor and materials used in making Hassam pavement under the said contract, or otherwise, and all profits made by you or either of you in the performance of the said contract, and especially all day books, journals, ledgers, order books, blotters and cash books used by you or either of you in connection with the performance of the said contract, and also all letters

and notices received from Hassam Paving Company or Oregon Hassam Paving Company, or either of them, notifying you or either of you not to infringe upon the said patents or advising you or either of you that the complainants or either of them were ready and prepared to furnish license, equipment and service offered in a certain proposal filed by the said complainants with the City of Hood River relating to the performance of the said contract, and particularly a certain letter of date April 9, 1913, addressed by Oregon Hassam Paving Company to Reliance Construction Company, Portland, Oregon.

And thereupon, on the 3d day of May, 1916, at the hour of 10 o'clock A. M., the defendant the Reliance Construction Company appears by Mr. Ralph R. Duniway, its solicitor, and the defendant the National Surety Company appears by Mr. Harrison Allen, its solicitor, and thereupon, on application of the solicitor for the defendants, this hearing was postponed until the 9th day of May, 1916, at the hour of 2 o'clock P. M., and the defendant the Reliance Construction Company was ordered to produce its accounts, as required by the decree at said time, and also to bring to the hearing the books, vouchers and correspondence specifically listed in the master's summons served upon it.

On this 9th day of May, 1916, at the hour of 2 oclock P. M., the complainants appear by Mr. Charles H. Carey, their attorney, and the defendant,

the Reliance Construction Company, appears by Mr. Ralph R. Duniway, its solicitor, and the defendant, the Reliance Construction Company, thereupon presents an account of the profits, as required by the master's summons, and a copy of this account was furnished to the solicitor for the complainants as follows:

PAVING, HOOD RIVER, OREGON.

<i>Date</i>	<i>Name</i>	<i>Amount Dr.</i>
1913		
Apr. 28	C. E. Steelsmith, agt.	\$ 24.00
29	Agt. ORN R. R.	33.12
May 1	Cash to set car. ....	.50
2	T/C Labor	4.50
3	T/C Labor	40.00
10	H. Foot	5.00
12	Pay Roll 5/9	270.45
	T/C Labor	190.20
27	Pay Roll 5/23	409.15
	A. N. Monmouth	3.75
	T/C Labor	306.05
31	T/C Labor	207.75
	T/C Maint.	1.30
	T/C Freight	234.74
June 10	Goodyear Rubber Co.	54.98
	Pay Roll 6/6	632.75
	T/C Labor	369.05
	T/C Freight	70.83
16	T/C Freight	377.33
	T/C Labor	438.60

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<i>Date</i>	<i>Name</i>	<i>Amount Dr.</i>
1913		
17	Blowers Hdw. Co.	4.40
	Transfer & Livery Co.	80.75
	G. G. Snow	50.97
	Stanley Smith Lbr. Co.	80.01
	C. F. Summer	1.75
	D. McDonald	41.55
19	Riverside Rock Co.	613.36
20	Honeyman Hdw. Co.	18.45
23	Frank E. Smith & Co.	233.10
	T/C Freight	177.65
	T/C Labor	137.50
	T/C Freight	331.45
	T/C Labor	169.85
25	Pay Roll 6/20	903.20
30	T/C Labor	286.95
	T/C Freight	304.70
July 3	Pacific Hdw. & Steel Co.	82.59
7	Riverside Rock Co.	558.45
8	Pay Roll 7/4	686.45
	Pacific Hdw. & Steel Co.	101.62
9	Pacific Tel. & Tel. Co.	15.40
11	Hirsch Weis Mfg. Co.	39.90
	Stranahan & Clark	4,000.00
	Transfer & Livery Co.	156.90
15	A. W. Curry	8.70
17	T/C Labor	54.85
	T/C Freight	271.85
	T/C Labor	568.95

vs. Hassam Paving Company, et al. 169

<i>Date</i>	<i>Name</i>	<i>Amount Dr.</i>
1913		
	T/C Freight	3.75
	T/C Labor	237.85
	T/C Freight	282.70
22	Pay Roll 7/18	985.90
	Stanley-Smith Lbr. Co.	45.65
	W. G. Snow	46.00
	D. McDonald	19.00
	Bridal Veil Lbr. Co.	64.48
	E. A. Franz Co. ....	.80
	T/C Labor	343.25
	T/C Freight	69.25
29	F. Rowley T/C	69.20
	T/C Labor	734.40
	T/C Freight	186.69
30	Giebisch & Joplin	37.06
	Giebisch & Joplin	4.35
	Giebisch & Joplin	98.00
31	T/C Labor	35.25
Aug. 4	D. P. & A. Nav. Co.	16.00
	O. W. R. & N. Co.	43.37
5	Transfer & Livery Co.	72.50
6	Transfer & Livery Co.	146.60
	Blowers Hdw. Co.	50.47
	W. G. Snow	10.75
	E. A. Franz Co.	1.40
	D. McDonald	2.55
	The Pairs Fair	8.50
	Riverside Rock Co.	1,137.75

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<i>Date</i>	<i>Name</i>	<i>Amount Dr.</i>
1913		
13	Consolidated Cont. Co.	331.25
	Buffalo Steam Roller Co.	8.75
14	Transfer & Livery Co.	1,410.00
15	Standard Oil Co.	123.80
16	Stranahan & Clark	2,500.25
25	Honeyman Hdw. Co.	5.50
27	Gorham Rever Rubber Co.	29.65
28	T/C Freight ....	.25
Sept. 13	Henry Foott	17.88
	John Hall	125.00
15	Labor	15.65
32	Goodyear Rubber Co.	55.10
Oct. 8	D. P. & A. Nav. Co.	12.00
14	Stranahan & Clark	510.34
Nov. 7	John Wood Iron Wks.	2.25
Dec. 27	Transfer & Livery Co.	117.00
1914		
Jan. 12	H. Morteson ....	.90
Mar. 26	Hood River County	54.10
July 14	Carbolineum Wood Pav. Co. ...	33.00
17	Frank E. Smith Co.	50.00
1915		
Jan. 19	Interest	199.64
	Expense	604.82
	Maintenance	258.19
Total Debit		<u>\$24,874.14</u>

1913

July 11	By City of Hood River (Rock) ..\$	12.00
	Refund on Freight	2.00
25	Warrants Less 1/2 of 1%	5,441.89
	Credit Ck. Pay Roll	2.00
	Hood River (Rock)	35.00
31	Credit Ck. Pay Roll	67.20
Aug. 6	Warrants Less 1/2 of 1%	7,922.75
22	Warrants Less 1/2 of 1%	8,568.92
Sept. 10	Warrants Less 1/2 of 1%	2,979.38
20	Warrants Less 1/2 of 1%	1,705.54
	Bridal Veil Lbr. Co.	17.00
29	Credit Ck. Pay Roll	12.80

1914

Feb. 18	Cash for Rock	6.00
		<hr/>
	Total Credits	\$26,774.48
		<hr/>
	Total Debit	\$24,874.14
	Gain	1,900.34
		<hr/>
		\$26,774.48

SUMMARY, PAVING, HOOD RIVER, OREGON.

Amounts expended, net:

Freight	\$ 2,461.06
Expense	1,270.22
Pay Roll	8,017.50
Plant	283.97
Hauling	1,983.75
Lumber	190.14

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Material	9,261.10
Rental	462.25
Maintenance	588.51
Interest	199.64

Gain	1,900.34
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\$26,618.48

Total amount of cash received for
warrants\$26,618.48

District of Oregon,
County of Multnomah,—ss.

I, Jos. Paquet, being first duly sworn, depose and say, that I am president of the Reliance Construction Company, a corporation, and the above account and statement of all profits made by said company by laying Hassam pavement in the City of Hood River, a municipal corporation, is true as I verily believe.

JOSEPH PAQUET,

President.

Subscribed and sworn to before me this 9th day
of May, A. D. 1916.

(Seal.)

RALPH R. DUNIWAY,

Notary Public for Oregon.

My commission expires Sept. 8, 1916.

And thereupon this hearing is adjourned until Monday, May the 15th, at 2 o'clock P. M., with leave to the complainants to interpose their objections, if any they have, to said account, on the date last above mentioned.

Complainants introduced letters, dated April 3, 1913, showing that they notified defendants of their claim of patents and warning against infringing by laying Hassam pavement without license, and notifying the City of Hood River that it would be held for damages if it permitted the pavement to be so laid.

The complainants also offered in evidence a general license offer of Oregon Hassam Paving Company, dated March 13, 1913, filed with the city recorder of Hood River March 18, 1913, before any bids were received by the City of Hood River for the proposed improvement, a copy of which license offer is hereinafter set forth.

Counsel for complainants offered in evidence a letter addressed by Oregon Hassam Paving Company to Reliance Construction Company, dated April 9, 1913, as follows:

April 9, 1913.

Reliance Construction Company,
Rothchild Building,
Portland, Oregon.

Gentlemen:

Enclosed herein please find copy of a proposal filed by this company with the City of Hood River.

We are advised that a contract for laying Hassam pavement has been awarded to you by the City of Hood River, and hereby notify you that we are ready and prepared to furnish the license equipment and service offered in said proposal, upon reason-

able notice from you as to the time you will require same.

Yours truly,

OREGON HASSAM PAVING COMPANY,

By W. A. Luey, Treasurer.

Complainants offered in evidence a license or assignment agreement between Hassam Paving Company, one of the complainants, and Oregon Hassam Paving Company, another of the complainants, assigning to Oregon Hassam Paving Company the exclusive territorial right to use the patents referred to in the complaint and to lay the so-called Hassam pavement within the district therein described, including the State of Oregon, which agreement is as follows:

AGREEMENT made this 16th day of July, A. D. 1909, by and between the Hassam Paving Company, a corporation duly established by law and having its usual place of business in the City and County of Worcester and Commonwealth of Massachusetts, party of the first part, and the Oregon Hassam Paving Company, a corporation duly established by law and having its usual place of business in the City of Portland and State of Oregon, party of the second part;

WITNESSETH:

THAT WHEREAS, letters patent of the United States, bearing the following numbers:

819,652;	851,625;	861,650;
861,651;	890,902;	912,125;

for an improvement in pavement and foundations and process of laying the same, are now owned by the party of the first part; and

WHEREAS, the party of the second part desires to use and make said improvement in pavement and foundations and process of laying the same according to said letters patent;

NOW, THEREFORE, in consideration of one dollar and other valuable consideration each to the other party paid, the receipt whereof is hereby acknowledged, it is mutually agreed as follows:

1. The party of the first part hereby gives to the party of the second part the exclusive right to use and make said improvement in pavement and foundations and process of laying the same according to said letters patent, for and during the term beginning the 16th day of July, A. D. 1909, and ending with the expiration of the term of said letters patent, in the State of Oregon, and a strip in the southern part of the State of Washington, extending from the westerly line of said state eastward to the Columbia River, and being twenty-five miles in width, measured from the southern boundary of the State of Washington, north, and not elsewhere or in any other place.

2. The party of the second part agrees to pay to the party of the first part therefor, as a license fee or royalty, the sum of fifteen (15) cents for each and every square yard of the improved pavement (known as Hassam pavement) described in said

letters patent and used or made by said party of the second part in said territory during the term of this agreement; and nine (9) cents for each and every square yard of foundation (known as Hassam foundation) described in said letters patent, when used or made by said party of the second part under any other kind of pavement except Hassam pavement for streets and sidewalks; provided, however, that if any foundation less than five inches (5") in thickness be made, said royalty per square yard shall be ratably reduced so that such royalties shall bear the same proportion to nine (9) cents that the thickness of said foundation bears to five inches.

3. The license fees and royalties shall be due and payable on or before the 20th day of each month for all pavement or foundations made or used during the preceding month.

4. The party of the second part shall at all times keep accurate accounts and make full returns in writing to the party of the first part on the 20th day of each month of the number of square yards used or made by it during the previous month. Such returns, if the party of the first part shall so require, shall be verified by oath of the party of the second part or someone in its behalf; and the party of the first part shall have the right, either by its officers or its attorney, to examine any and all of the books of account of said party of the second part containing any items, charges, memoranda or

information relating to the use or making of said improvement or process; and upon request made the party of the second part shall produce all such books and papers for said examination.

5. The party of the second part agrees not to contest the validity of said letters patent and the rights of the party of the first part thereunder at any time during the continuance of this agreement.

6. The party of the second part further agrees to assign to the party of the first part any patents or claims to patents relative to an improvement for a street pavement constructed of stone, sand and hydraulic or Portland cement or process therefor, in which it may be directly or indirectly interested, or to which it may become entitled during the continuance of this license, and for a term of three years after the termination thereof, or after the extension or renewal of the same.

7. The party of the second part agrees to make no contract for the use or making of said pavement or foundation according to said letters patent, unless such contract provides for the execution of the work in accordance with the approved specifications, a copy of which is hereto annexed.

No variation of said approved specifications shall be made unless the consent in writing of the party of the first part is first obtained, or unless the party of the first part shall make any variation therein and give notice thereof in writing to the party of the second part by mailing such notice to

the last known business address of the party of the second part.

The party of the second part agrees to conform in all respects to said approved specifications or to variations therein approved or made by the party of the first part, and to perform truly and faithfully all work called for thereby; and agree that in the event that it does not conform to said specifications or to the variations therein in the performance of the work called for therein, in accordance therewith, of which the party of the first part shall be the sole judge, the party of the first part may take possession of the work and complete the same according to said specifications or variations, at the expense of the party of the second part, which expense and any damage caused by said failure or default, the party of the second part agrees to pay.

8. The rights herein granted are on the express condition that the party of the second part shall, within such period of twelve months following the date of this agreement during the term thereof, use said patent by the actual constructions of work to an extent to cause it to pay the said party of the first part within each of said periods royalties or license fees amounting to not less than the sum of five thousand dollars (\$5,000), and in the event of said party of the second part failing to pay the party of the first part the license fees or royalties above set forth, then the rights herein granted at the option of the party of the first part, may be

revoked by notice in writing from the party of the first part, in the manner hereinafter specified.

The party of the first part reserves the right to waive any one or more breaches in the above agreement on the part of the party of the second part, and any waiver of any one or more shall not operate as a waiver of them all; it being the intent of the parties that if, in the judgment of the party of the first part, the party of the second part is laying and constructing as much pavement as is practicable or possible under the circumstances of the case in said territory, then that said party of the first part may not, if it so elects, take advantage of any technical breach or otherwise.

9. It is further agreed that if the royalties or license fees, or any part thereof, shall at any time be in arrears for thirty days after the same shall have become due, or if the party of the second part shall have become bankrupt or insolvent, or enter into any composition with its creditors, or shall make any default in performing any of the agreements herein contained, which agreements are to be construed as conditions of the license hereby granted, the party of the first part may terminate its license, by notice in writing given to the party of the second part by mailing such notice to its last known business address, which license shall thereupon become void, without prejudice to any right of action or remedy of the party of the first part for the recovery of any moneys then due to it hereunder,

or in respect of any antecedent breach of any agreement herein contained; and provided further that if the party of the second part shall discontinue the use of this license, and shall not in the said territory use or make said pavement or process of laying the same for a space of six months in any year, the party of the first part shall be at liberty, by notice in writing given as aforesaid, to terminate this license without prejudice to any right of action or remedy for the recovery of any moneys then due to it hereunder.

10. The party of the second part further agrees to use its utmost reasonable endeavors to create and maintain as large a business as possible in the making of said improved pavements and processes in all the above specified territory.

If the party of the first part is not satisfied with the endeavors of the party of the second part to create and maintain a business of satisfactory size, it reserves the right to enter said territory and to make contracts for paving at a price not less than one dollar and ninety cents (\$1.90) per square yard for finished pavement. Said contracts are to be taken in the name of the party of the second part who agrees that it will execute the same and in default of said execution the party of the first part may enter and execute the contract or contracts and revoke the license.

And if the party of the second part shall not at any time during the continuance of this agreement

make all reasonable endeavors (and of the reasonableness of the endeavors the party of the first part is the sole judge) to secure contracts in all portions of the aforesaid territory, the party of the first part shall be at liberty at any time, on notice as above specified, to revoke this license as to such part of said territory as it shall deem not to have favorably worked or exploited.

If, in the opinion of the party of the first part, the party of the second part by reason of its interest in other pavements, or by reason of its becoming licensed as to other pavements, shall not be doing for said Hassam pavement all that it should, then said party of the first part may revoke this license at any time by notice in writing as above specified, but any such revocation contemplated in this clause shall not operate to take away from said party of the second part the right to finish existing contracts or to take and execute contracts made on bids filed with any municipality as of the time when said license is revoked.

11. The party of the second part shall not assign any rights hereunder without the consent and approval in writing of the party of the first part being first obtained.

12. This agreement is executed and delivered in the Commonwealth of Massachusetts and shall be construed and interpreted in accordance with the laws thereof.

IN WITNESS WHEREOF, the parties hereto

set their hands and cause their seals to be affixed by their proper officers thereunto duly authorized, the day and year first above written.

HASSAM PAVING COMPANY,

(Signed) By Walter E. Hassam, Gen. Mgr.

(Signed) Approved:

ALFRED THOMAS, Treas.

OREGON HASSAM PAVING COMPANY,

By

APPROVED SPECIFICATIONS FOR LAYING
HASSAM CEMENT-CONCRETE PAVING.

Time Commenced: Work upon said pavement shall be commenced by the contractor within days after the date of this contract and shall be pushed with diligence until completed.

Street Opened: Only so much of the street shall be opened and obstructed from travel at any time, by the contractor, as shall meet with the approval of the

Excavation: The roadway shall be excavated by the contractor to a depth of from the finished grade of the street.

If the subsoil is of a clay or loamy nature, it shall be excavated to an extra depth of and shall be re-filled with gravel or cinders and then rolled or compressed to the proper subgrade.

Thickness: The thickness of said pavement shall be at least six (6") inches from the subgrade to the finished grade of the street.

Paving: Upon the subgrade, after being thoroughly rolled or compressed to a true and even surface at least six (6") inches below the finished grade, shall be spread a layer of stone varying in size from $2\frac{1}{2}$ " to $1\frac{1}{2}$ " to conform with the grades and contour of the street after rolling. After this stone has been thoroughly compacted by rolling or compression and firmly imbedded and the voids reduced to a minimum, it shall be grouted with a grout consisting of one part Portland cement to one part sand. This grout shall be poured upon the stone until all the voids are filled and the grout flushes to the surface. The rolling or compression to continue during the process of grouting. Upon this surface shall be placed a very thin layer of pea stone which shall be spread and rolled or compressed even and smooth over the entire surface, rolling to continue until grout flushes to surface.

Expansion Joints: Suitable expansion joints shall be provided at the curb and across the street, as the contractor may direct.

Cement: All cement shall be for first quality Portland cement.

Sand: The sand shall be fine, clean and sharp and free from clay or loam.

Water: All water necessary for the construction of the pavement shall be furnished free of cost to the contractor by the

Stone: The broken stone may be of any proper or suitable grain or quality.

Street Closed: All paving shall be kept without travel for a period of at least six (6) days after the completion if necessary in the judgment of the contractor, before being opened to the public for use.

Marking of Paving: Every street laid shall be marked with a suitable mark, with the inscription, "Patented May 1, 1906; April 23, 1907; July 30, 1907; June 16, 1908."

The defendant, National Surety Company, furnished no statement of any kind, and complainants made no effort to compel it to do so, other than as herein shown, and gave no evidence against it other than it was surety for the Reliance Construction Company for performance of contract and to indemnify the City of Hood River against patent infringement by the Reliance Construction Company.

The defendant, City of Hood River, furnished no statement of any kind, and complainants made no effort to compel it to do so, and gave no evidence against it other than it was the purchaser of the pavement from the Reliance Construction Company.

Mr. Crane, manager of the complainants, when a witness for complainants, stated that complainants were not yet proceeding for damages against the City of Hood River.

The plaintiffs filed statement of damages as follows:

(Title.)

COMPLAINANTS' DEBIT AND CREDIT STATEMENTS IN ALTERNATIVE FORM, SHOWING DAMAGES FROM INFRINGEMENT BY THE ABOVE NAMED DEFENDANTS, THE SAME BEING FURNISHED ON THE ACCOUNTING IN THE ABOVE SUIT BEFORE HON. WALLACE McCAMANT, MASTER IN CHANCERY.

Contract at Hood River, Oregon, dated March 24, 1913.

Contract completed and accepted September 15, 1913.

Total number of square yards Hassam pavement, 18,109.59.

STATEMENT NO. 1.

Complainants' damages estimated upon the basis of a license offer made to the defendants and others and not accepted by the defendants.

Reliance Construction Company and National Surety Company

To

Hassam Paving Company and Oregon Hassam Paving Company, Dr.

To amount of damages sustained by above named complainants on account of infringement of patents Nos. 819652, 819650, 851625, on the above mentioned contract, the damages being estimated at 50 cents per square yard, as per offer of com-

plainants on file in the office of the city recorder of Hood River, Oregon, dated March 18, 1913, a copy of which was furnished prior to beginning the work to Reliance Construction Company April 9, 1913, by mail, deducting from the said price certain expense items to be furnished by the complainants as per the said offer:

DEBIT

18,108.59 square yards at 50 cents.....\$9,054.29

CREDIT

To wages of superintendent and mixer-man
and freight on machinery to Hood
River, the same to be furnished by the
complainants, estimated at four cents
per square yard 724.34

Balance due\$8,329.95

STATEMENT No. 2:

Complainants' damages estimated on the basis of complainants' average profits for work of similar character during the year 1913.

Reliance Construction Company and National Surety Company

To

Hassam Paving Company and Oregon Hassam Paving Company, Dr.

To amount of damages sustained by the above named complainants on account of infringement of patents Nos. 819652, 819650 and 851625, on the above mentioned contract, said damages being cal-

culated upon the average profits of the complainants on similar work, according to the experience of complainants as shown by their books of account during the year 1913:

DEBIT

18,108.59 square yards at \$.4523.....\$8,190.51

STATEMENT No. 3:

Complainants' damages estimated upon the profits complainants would have made had the contract been awarded to them upon their bid to the City of Hood River:

Reliance Construction Company and National Surety Company

To

Hassam Paving Company and Oregon Hassam Paving Company, Dr.

To amount of damages sustained by the above named complainants on account of infringement of patents Nos. 819652, 819650 and 851625, upon the above mentioned contract, said damages being estimated upon the loss of profits to the complainants by reason of the infringement upon the bid of complainants to the City of Hood River, of \$1.70 per square yard, deducting the average cost of complainants for work of similar character during the year 1913:

DEBIT

18,108.59 square yards at \$1.70.....\$30,784.60

CREDIT

To average cost to complainants per
square yard, based on complainants'
experience during the year 1913 in do-
ing similar work, as follows:

Materials	Cement .....	.4277
	Rock .....	.3730
	Sand .....	.0530
Labor	Spreading Rock....	.0591
	Grouting .....	.0768
	Misc. ....	.0663
Misc. Cost	Teams, Coal, Oil,	
	Water, etc.....	.0237
	Bonds, etc. ....	.0333
	Freight, etc. ....	.0100
		\$1.1259

Estimate based on prices as follows:

Cement delivered on the job.....	\$2.10
Rock " " " "	2.00
Sand " " " " .....	.80

\$18,651.85

Balance due.....\$12,132.75

The plaintiffs filed objections to statement of profits by Reliance Construction Company, as follows:

(Title.)

HEARING BEFORE HON. WALLACE McCAM-
ANT, MASTER IN CHANCERY.

Now come the complainants and make the following objections to the account of profits filed by the defendant Reliance Construction Company in the above entitled suit:

ITEM FIRST.

Complainants object to the debit

item January 19, 1915,

Interest	\$199.64
Expense	604.82
Maintenance	258.19

Total	\$1,062.65
-------------	------------

for the reason that none of the said items is proper to be charged in the said account or to be allowed the complainants as a debit in this infringement suit.

ITEM SECOND.

Complainants object to the items in the

credit side of the account under dates

July 26, August 6, August 22, September

10 and September 20, 1913, wherein

is deducted one-half of one per cent of

the amount of certain warrants of the

City of Hood River, aggregating \$26,-

752.27, the amount of all such dis-

counts being\$ 133.79

on the ground that the discount aforesaid is not a

proper deduction from the gross amount received by the defendant.

ITEM THIRD.

Complainants object to the said account on the ground that although the same contains charges for certain tools, equipment and material used in the performance of the work, no credit is given for the salvage upon the same, and there should be credited the salvage value thereof, which on short term contract is estimated at twenty-five per cent of the purchase price on the following items:

Hose and couplings	\$ 56.10
Saw, hammer, axe, cable, shov-	
els, picks and handles....	41.55
2-20x30 10 oz. canvas covers..	39.90
Rakes, steel tampers, push	
brooms	18.45
Brooms	5.50
200 ft. of 1½-inch hose and	
couplings	55.10
	<hr/>
	\$216.60

Twenty-five per cent of the above.....\$ 54.15

ITEM FOURTH.

Complainants object to \$95.00 of the amount included in the item of the debit account under date June 23, 1913, to Frank E. Smith & Company, \$233.10, for the reason that the said \$95.00 appears to have been paid by the defendant for a bond in-

demnifying the City of Hood River for the infringement of the patents involved in this suit.

Amount to be added to the account.....\$ 95.00

ITEM FIFTH.

Complainants object to the debit item under date September 13, 1913, to John Hall, \$125.00, for the reason that no detail or voucher is furnished and for the further reason that it would appear the sum was paid for legal advice concerning the infringement of the patents involved in the suit.

Amount to be added to the account.....\$ 125.00

ITEM SIXTH.

Complainants object to the item in the debit account under date July 17, 1913, Frank E. Smith & Co., \$50.00, for the reason that no detail or voucher is furnished and for the further reason that it would appear the said item is for the renewal of the bond indemnifying the City of Hood River for the infringement of the patents involved in this suit.

Amount to be added to the account.....\$ 50.00

ITEM SEVENTH.

Complainants object separately and severally to the following debit items appearing in the said account, each on the ground that no invoice or detail is furnished and it does not appear that the same or any of them are proper items to be charged in the said account:

'1913

Apr. 20,	Chas. E. Steelsmith,	
	Agent	\$24.00
May 1,	Cash to Set Car.....	.50
May 10,	Henry Foott	5.00
June 2,	S. H. Tate	1.25
July 15,	A. W. Curry	8.70
July 29,	F. Rousley	69.20
July 30,	Giebisch & Joplin.....	37.06
July 30,	Giebisch & Joplin.....	4.35
July 30,	Giebisch & Joplin.....	98.00
Aug. 6,	D. McDonald	2.55
Sept. 13,	Unloading Cars at	
	Hood River	15.65

1914

Jan. 1,	H. Morteson .....	.90
Feby. 26,	Hood River County....	54.10

\$321.26

Amount to be added to the account.....\$ 321.26

RECAPITULATION.

Profit as shown by account furnished by
defendants\$1,900.34

Amounts to be added as above:

Item First	\$1,062.65
Item Second	133.79
Item Third	54.15
Item Fourth	95.00
Item Fifth	125.00

Item Sixth 50.00

Item Seventh 321.26

\$1,841.85

Actual Total Profits.....\$3,742.19

Respectfully submitted,

HASSAM PAVING COMPANY and
OREGON HASSAM PAVING COMPANY.

Carey & Kerr,
Their Solicitors.

EVIDENCE OF PLAINTIFF.

Plaintiff introduced the following documents:

A general license offer of Oregon Hassam Paving Company, dated March 13, 1913, filed with the city recorder of Hood River, Oregon, March 18, 1913, as above stated, which is as follows:

WHEREAS, it is desired by OREGON HASSAM PAVING COMPANY, an Oregon corporation, license of all of the processes and patents covering the right to lay Hassam Compressed Concrete Paving, that opportunity be given for competition in bids for the improvement of streets in Hood River with the said Hassam paving; and

WHEREAS, the construction of such pavements requires the use of certain patented methods and processes, and the careful and expert preparation and use of materials;

NOW THEREFORE, in order to provide for

competitive bidding and at the same time to secure the adoption of said Hassam Compressed Concrete Paving as the kind of pavement to be used in the improvement of streets in the City of Hood River, and furthermore, to insure the proper laying down of the same so that the work will give satisfaction, the undersigned, Oregon Hassam Paving Company, hereby agrees for the consideration hereinafter named to furnish to any and all bidders to whom contracts for such improvements in streets of the City of Hood River may be awarded, the right to lay said pavement upon the following terms and conditions:

1st. The Oregon Hassam Paving Company grants the right to use any and all processes owned or controlled by it, which are necessary to be used for the laying of said paving, said pavement to be laid in accordance with the Hassam specifications.

2nd. It will furnish to the successful bidder an expert who will give proper advice as to the laying of such pavement, and will supply a double Hassam grout mixer and a steam roller, and will also furnish all the skilled workmen necessary for operating the said Hassam grout mixer.

3rd. The price at which the said license and service is offered to any and all bidders and contractors is fifty cents (\$0.50) per square yard for the finished pavement. The license fees shall be due and payable on or before the 20th of each month for all pavement laid the previous month.

4th. Successful bidders for this work shall at all times keep accurate account and make full returns to the Oregon Hassam Paving Company on the 20th day of each month, of the number of square yards laid during the previous month.

IN WITNESS WHEREOF the said Oregon Hassam Paving Company has caused these presents to be executed at Portland, Oregon, this 18th day of March, 1913.

OREGON HASSAM PAVING COMPANY,

(Signed) By P. L. Assmann, Sec.

(Corporate Seal)

ORDINANCE NO. 432.

An Ordinance providing for the paving of Oak Street from Front to Fifth Street, Cascade Avenue from First to Fifth Street, Front Street from Oak to State Street, First Street from Oak to State Street, Second Street from Cascade Avenue to State Street, Third Street from Columbia Street to State Street, Fourth Street from Columbia Street to Oak Street, and providing that the cost thereof shall be a lien thereon upon the abutting property, and repealing all ordinances and parts thereof in conflict therewith.

THE CITY OF HOOD RIVER DOES ORDAIN
AS FOLLOWS:

Section 1. It is hereby determined by the Common Council of the City of Hood River, Oregon, to improve Oak Street in the City of Hood River,

Oregon, from Front to Fifth Street; Cascade Avenue from First to Fifth Street; Front Street from Oak to State Street; First Street from Oak to State Street; Second Street from Cascade Avenue to State Street; Third Street from Columbia Street to State Street; Fourth Street from Columbia Street to Oak Street, by grading, filling or excavating, as the case may be, the same from curb line to curb line to such depth and contour as shall be required to receive the paving to be placed thereon as herein specified, so that the paving shall be when finally completed on the established grade on said street. Said streets shall then be paved from curb line to curb line upon the road-bed as above prepared with single course five inch concrete pavement of such consistency and in the manner and form set forth in the specifications therefor, prepared by the City Surveyor of the City of Hood River, to be filed with the City Recorder of the City of Hood River by the date of the final passage of this ordinance; or, with five inch Hassam pavement of such consistency and in the manner and form set forth in the specifications therefor, prepared by the City Surveyor of the City of Hood River to be filed with the City Recorder of the City of Hood River by the date of the final passage of this ordinance.

Section 2. The whole cost of said improvement as specified in Section 1 of this ordinance, as well as the cost of the improvement of the intersections of streets in the district specified in Section 1 of

this ordinance, shall be borne by and assessed to the property abutting on said streets in accordance with Sections 68 and 69, of Chapter 8 of the Charter of the City of Hood River, as the same has been amended and is now in force, and the manner of collecting such assessment and the entry thereof in the Docket of City Liens, and all other matters of procedure in connection therewith, shall be had and done in accordance with the provisions of said Chapter 8 of said charter applicable thereto.

Section 3. The term "whole cost" used in Section 1 of this ordinance shall be held and considered to induce the necessary cost of engineering, surveying and advertising.

Section 4. The necessary work, labor and material for providing said improvement as specified in Section 1 of this ordinance shall be let in one contract, which will be required to be fully performed within seventy-five days from the date of awarding the same. All bids for said work will be opened and considered by the Common Council at the Council Chambers in the City of Hood River at its next regular meeting after the date of completion of publication of said notice calling therefor thereafter provided.

Section 5. The Recorder of the City of Hood River is hereby directed to advertise for sealed proposals for doing said work specified in Section 1 of this ordinance for ten days by publication in some newspaper published in the City of Hood

River, stating that the Common Council will at its next regular meeting after the date of completion of publication of said notice, to-wit, the 24th day of March, 1913, at the hour of eight o'clock P. M. on said day, open and consider said proposals; that the said improvement is ordered by this ordinance, giving the date and number thereof; that said improvement will be required to be completed by the successful bidder within seventy-five days from the date of awarding said contract; that complete specifications are on file in the office of the City Recorder covering each of said kinds of pavement for which bids are asked, copies of which will be furnished to prospective bidders upon the deposit of \$5.00 to insure the safe return thereof after awarding the contract; that the contract will be awarded upon said specifications on file in the City Recorder's office for the kind of improvement selected by the Common Council, the city reserving the right to reject any and all bids, or to waive any defect in said bids for the benefit of the City of Hood River, and the terms thereof shall be notice to prospective bidders of the requirements demanded by the City of Hood River in the performance of said work under said contract; and that said work will be let in one contract.

Section 6. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

Section 7. Whereas, it is urgent that the contract be let at the earliest possible date for the

work required to be done under this ordinance, so that same may be completed in such time as to give the earliest possible use of the streets of the City of Hood River in the improved condition for traffic; in the opinion of the council this ordinance is necessary for the immediate preservation for the welfare and best interests of the City of Hood River; therefore, an emergency is hereby declared to exist and this ordinance shall go into full force and effect upon its final passage and approval by the mayor.

Passed the Common Council of the City of Hood River, Oregon, this 10th day of March, 1913.

(Signed) H. L. HOWE,
City Recorder.

Approved by me this 11th day of March, 1913.

E. O. BLANCHAR,
Mayor.

AFFIDAVIT OF PUBLICATION.

State of Oregon,
County of Hood River,—ss.

I, L. S. Bennett, being duly sworn, say that I am printer of the Hood River News, a newspaper of general circulation, published weekly in Hood River, in Hood River County, State of Oregon, and that the annexed advertisement has been published in said paper in each and every issue of the entire number, and not in any supplement, for two consecutive weeks, commencing with the issue of March

200 *Reliance Construction Company, et al.*

12, 1913, and ending with the issue of March 19, 1913.

L. S. BENNETT.

Subscribed and sworn to before me this 3d day of April, 1913.

H. L. HOWE,
City Recorder.

(Attached to the foregoing affidavit is the following printed slip:)

NOTICE OF STREET IMPROVEMENT.

Pursuant to order of the Common Council contained in Ordinance No. 432 of the City of Hood River, passed by the Common Council on the 10th day of March, 1913, and approved by the mayor on the 11th day of March, 1913, notice is hereby given that the undersigned, city recorder, will receive bids for the improvement of Oak Street in the City of Hood River, Oregon, from Front Street to Fifth Street; Cascade Avenue from First to Fifth Streets; Front Street from Oak Street to State Street; First Street from Oak to State Street; Second Street from Cascade Avenue to State Street; Third Street from Columbia to State Street; Fourth Street from Columbia to Oak Street, by grading, filling or excavating the roadway of the same from curb line to curb line as the case may be, of such depth as shall be required to receive the paving to be placed thereon as herein specified, so that the paving when finally completed shall be on the established grade on said streets and the paving of said streets from

curb line to curb line with single course five inch concrete pavement, or with five inch Hassam pavement, each to be of such consistency and done in the manner and form set forth in the specifications for each class of pavement, prepared by the city surveyor and now on file in my office. Sealed proposals will be received at my office up to eight o'clock P. M. March 24th, 1913, and the Common Council will at its next regular meeting after completion of publication of this notice, to-wit, on the 24th day of March, 1913, at the Council Chambers at the hour of eight o'clock P. M., proceed to open and consider all bids for said work, which is ordered by the Common Council by said Ordinance No. 432, duly enacted as above specified; that the improvement will be let in one contract, and will be required to be completed within seventy-five days from the date of awarding the same to the successful bidder; that complete specifications are on file in my office covering each kind of improvement for which bids are called, copies of which will be furnished to prospective bidders upon the deposit of five dollars to insure the safe return thereof to the City of Hood River after awarding the contract, and said contract will be awarded to the lowest and best bidder upon said specifications for the kind of improvement selected by the Common Council. The city reserves the right to reject any or all bids, or to waive any defects therein for the benefit of the City of Hood River. The terms of

said specifications shall be notice to prospective bidders of the requirements demanded by said city in the performance of said work.

This notice is given for ten days by publication thereof in the Hood River News, a newspaper published at the City of Hood River, Oregon, the date of the first publication thereof being the 12th day of March, 1913.

H. L. HOWE,
City Recorder.

CONTRACT.

This Agreement, made and concluded Monday, the 24th day of March, 1913, between the City of Hood River, Oregon, a municipal corporation, party of the first part, hereinafter called the City, and the Reliance Construction Company, an Oregon corporation duly authorized to transact business in the State of Oregon, with its principal office in said state at the City of Portland, party of the second part, hereinafter called the Contractor.

Witnesseth, that for and in consideration of the payments, covenants and agreements hereinafter mentioned to be made and performed by the party of the first part, and under the penalty expressed in the bond hereunto annexed, the said party of the second part agrees with the party of the first part that it will construct, build, furnish all materials for, and in every way complete the work of paving Oak Street from Front Street to Fifth Street, Cascade Avenue from First Street to Fifth

Street, Front and First Streets from Oak Street to State Street, Third Street from Columbia Street to State Street and Fourth Street from Oak Street to Columbia Street; the full width of the roadway from curb line to curb line, doing the necessary work of excavation and filling or embankment, and placing of the necessary fir headers and the furnishing and placing of monument cases, in strict accordance with the plans and specifications attached hereto, and the terms of which and each of which, is expressly made a part of this contract, as to all the matters contained in said specifications and plans and the instructions of the engineer.

The said Contractor further agrees that he will pay punctually the workmen who shall be employed upon the work and the persons who shall furnish material therefor, and that he will furnish the City with satisfactory evidence that all persons who have done work or furnished material under this contract have been fully paid or are not entitled to any lien under the laws of this state; and in case such evidence be not furnished as aforesaid, such amount of money as the City may consider necessary to pay the claims of the persons aforesaid, which may be filed with the City, may be deducted from the amount due the Contractor on his contract and shall not be paid to him until the liabilities aforesaid have been fully paid and the evidence thereof furnished the City; or until the time shall

have elapsed within which the said parties are legally entitled to a lien against the City.

The Contractor further agrees that he will give personal attention constantly to the faithful performance of this contract; that he will not assign any money due or to become due upon this contract, or sublet any of the work to be done under this contract without the consent of the City endorsed upon this contract in writing, and that no person other than said Contractor has any claim or interest thereunder.

Said Contractor further agrees that if the work to be done under this contract shall be abandoned, or if this contract shall be sublet or assigned by said Contractor, or any of the money or orders payable thereunder shall be assigned otherwise than herein provided for, or if any time the engineer is of the opinion and shall so certify in writing, to the City, that the work is unnecessarily or unreasonably delayed, or that the Contractor is wilfully violating the terms, covenants and agreements of this contract, or is not executing this contract in good faith, then the City shall have the right to notify the Contractor to discontinue said work, and such part thereof as the City may designate, and to take possession of the work and either re-let the same by contract or furnish the necessary tools and appliances for completing the said work, under the directions of the engineer; and if the cost of so completing the work, or any part thereof, is less

than the sum of money due the Contractor upon this contract, the sum of money left after deducting all of the expenses for so completing the work shall be paid to the Contractor or his assigns; but if the cost is greater than the sum of money due the Contractor upon the contract, then the Contractor or his sureties upon his bond shall pay to the City the amount of money that the expenses of so completing the work exceeds the amount of money due upon the contract. In lieu of the exercise of the power hereinbefore given in case of said Contractor's failure to employ workmen, purchase tools and materials and complete the work, the City reserves the right and option to annul and cancel this contract and re-let the work or any part thereof; and said Contractor shall not be entitled to any claim for damages on account of said annulment, nor shall such annulment debar the City from the right to recover damages which may arise on account of the failure of the Contractor to fulfill the terms of this contract; and in case of such annulment, all moneys due the Contractor, or retained under the terms of this contract, shall be placed to the credit of a fund created for the purpose of paying the expenses of completing the work, but such forfeiture shall not release said Contractor or his sureties from the fulfillment of this contract; and they shall be liable to the City for any greater sum that the cost of the completed work exceeds the amount of the original contract.

Said Contractor also agrees that the engineer shall decide as to the meaning and intent of any portion of the foregoing specifications and of the plans, where the same may be found obscure or in dispute, and the engineer shall have the right to correct any error or omissions therein, when such corrections are necessary to the proper fulfillment of the intentions of said plans and specifications. The action of such correction to date from the time that the said engineer gives due notice thereof; and it is also agreed by said Contractor that the City or engineer may, at any time, make any changes in the location, form, dimensions, grades and alignments, and may make any variation in the quantity of the work to be done, as exhibited in the schedule of prices or bid for said work, and may entirely exclude any of the items of work relating to said quantities at any time, either before the commencement of the work or during the progress, without thereby altering or invalidating any of the prices herein mentioned, or this contract in any respect. Should such action diminish the amount of work that would otherwise be done, no claim shall be made for damages on the ground or loss of anticipated profits on work so dispensed with; and should such action be taken after the commencement of any particular piece of work and result thereby in extra cost to the Contractor, the engineer shall certify to the City the amount to be allowed therefor, which he shall consider fair and equitable as between the

parties, and his decision shall be final and conclusive.

Said Contractor hereby admits that he has read each and every clause in this contract, and fully understands the meaning of the same, and hereby agrees that he will comply with the terms, covenants and agreements herein set forth.

And the said Contractor further agrees that he will execute a bond in the sum of six thousand nine hundred and four dollars and ninety-five cents (\$6,904.95) running to the City of Hood River, and with such sureties as shall be approved by the City; to keep and perform well and truly all the terms and conditions of this contract on his part to be kept and performed, and to indemnify and save harmless the said City, as is herein stipulated.

And the said Contractor further agrees that the payment of the final amount due under this contract, and the adjustment and payment of any bill rendered for work done in accordance with any alterations of the same, shall release the City from any and all claims or liability on account of work done under said contract, or any alterations thereof.

II.

The City, for and in consideration of the true and faithful performance of the covenants and agreements herein mentioned to be performed by the Contractor, agrees to pay the Contractor in full for all the work and material to be required by this contract, at the following rates and prices, viz.:

3500 cu. yds. of excavation, more or less, at 50c per cu. yd.

500 cu. yds. of embankment, more or less, at 10c per cu. yd.

19000 sq. yds. of Hassam pavement, more or less, at \$1.35 per sq. yd.

433 lin. ft. of Fir Headers, more or less, at 30c per lin. ft.

4 Monument Cases, more or less, at \$10.00 each.

The City agrees to pay the Contractor at the rates aforesaid, in the manner and at the time specified and definitely set forth in the specifications attached to this contract and expressly made a part hereof, as if fully written herein.

And it is further mutually understood and agreed:

That to prevent all disputes and litigations the engineer shall, in all cases, be the referee to determine the amount, quality, acceptability and fitness of the several kinds of work which are to be paid for under these specifications, and to decide upon all questions which may arise as to the fulfillment of said contract on the part of the Contractor, and his decision and determination shall be final and conclusive.

And that the following documents are essential portions of the complete contract:

The instructions to bidders, the proposals, all maps, drawings, plans and profiles hereto at-

tached, or herein described, the specifications, specific contract and Contractor's bond.

IN WITNESS WHEREOF, the City of Hood River has caused these presents to be executed by its mayor and recorder, and its corporate seal attached, pursuant to a resolution of the Common Council, duly and regularly adopted on the 24th day of March, 1913, and the Contractor, the Reliance Construction Company, has caused these presents to be executed by its president and secretary, and its corporate seal attached, pursuant to a resolution of its board of directors, heretofore duly and regularly adopted, both this the day and year first above written.

(Signed) CITY OF HOOD RIVER,

By E. O. Blanchar, Mayor.

(City Seal) Attest: H. L. Howe, Recorder.

RELIANCE CONSTRUCTION COMPANY,

By Joseph Paquet,

(Corporate Seal) President.

Attest: G. Giebisch,
Secretary.

In the City of Hood River, Oregon.

The Honorable City Council,

Hood River, Oregon.

Gentlemen:

The undersigned, having full knowledge of the work to be done and the quality of the materials to be furnished, hereby propose to furnish all materials and all labor required for the construction of

FIVE INCH HASSAM PAVEMENT

On Oak, Front, Second, Third and Fourth Streets and on Cascade Avenue in the City of Hood River, Oregon, in the City of Hood River to be in strict accordance with the plans and specifications and at the following rates and amounts:

3,500	Cu. Yds. of Excavation at \$.....\$.....
500	Cu. Yds. of Embankment at \$.....\$.....
19,000	Sq. Yds. at \$.....\$.....
	Pavement
433	Lin. Ft. at \$.....\$.....
	Headers
4	Monument Cases at \$.....\$.....
	Total, \$.....

It is understood and agreed that the quantities stated are approximate only and are given for the purpose of comparing bids on a uniform basis; that payments will be made only for materials actually furnished and work actually performed and that the right is reserved by the City to reject any or all bids.

Enclosed herewith is a certified check for \$....., the same being at least five per cent (5 per cent) of the amount of this bid, payable to the recorder of the City of Hood River, Oregon, as liquidated damages in case that....should fail or neglect to furnish the required bonds and execute the contract within ten (10) days after receiving notice of award.

Signature
Address

SPECIFICATIONS FOR THE CONSTRUCTION
OF FIVE INCH HASSAM PAVEMENT,
HOOD RIVER, OREGON.

DESCRIPTION.

Section 1. The work to be done under these specifications consists in furnishing all materials and labor required for the construction of five inch Hassam pavement on the following streets in the City of Hood River, Oregon: Oak Street from Front Street to Fifth Street; Cascade Avenue from First Street to Fifth Street; Front and First Streets from Oak to State Streets; Third Street from Columbia Street to State Street and Fourth Street from Oak to Columbia Street, as set forth in the accompanying proposal and required by the plans and specifications.

Section 2. The proposal for the work must be submitted on forms prepared for the purpose by the city engineer and must be enclosed in a sealed envelope and addressed as directed in the advertisement for proposals and indorsed on the outside,

PROPOSAL FOR THE CONSTRUCTION OF
HASSAM PAVEMENT.

Section 3. Each construction proposed must be accompanied by a certified check on some responsible bank for five (5) per cent of the aggregate bid, made payable to the Recorder of the City of Hood River, Oregon, as a guarantee that if the contract be awarded to such bidder, he will enter into a contract and give security as hereinafter pro-

vided for its faithful performance within fifteen (15) days after receiving notice of such award and begin work within ten days after the date of the contract.

Such check will be held by the City until the Council shall award the contract or reject all bids. Checks accompanying bids not accepted will be returned to the unsuccessful bidders by the recorder.

Section 4. The work to be done under these specifications shall be completed on or before June 7, 1913.

(The rest of the specifications with the exception of Section 25, is not important on this appeal, and Section 25 is as follows) :

PATENTS.

Section 25. All fees or royalties for any patented invention, article, or arrangement that may be used upon, or in any manner connected with, the work, or any part thereof, connected with these specifications, shall be included in the price mentioned in the contract, and the Contractor shall protect and hold harmless the City against any and all demands for such fees or royalties, and before the final payment is made on the contract, the Contractor must furnish acceptable proof of a proper and satisfactory release from all such claims.

FRANK E. SMITH—SURETY BONDS.

KNOW ALL MEN BY THESE PRESENTS,
That we, RELIANCE CONSTRUCTION COMPANY, a corporation organized and existing under

and by virtue of the laws of the State of Oregon, with its principal office in the City of Portland (hereinafter called the Principal) as principal, and the NATIONAL SURETY COMPANY, a New York corporation duly authorized and empowered to become surety on bonds, undertakings, etc., in the State of Oregon, (hereinafter called the Surety), as surety, are held and firmly bound unto the CITY OF HOOD RIVER, a municipal corporation of the County of Hood River, State of Oregon (hereinafter called the Obligee), in the full and just sum of six thousand nine hundred four and 95/100 (\$6,904.95) dollars lawful money of the United States of America, for the payment of which sum, well and truly to be made the said Principal and Surety bind themselves, their heirs, successors and assigns, jointly and severally, firmly by these presents.

THE CONDITIONS OF THIS OBLIGATION ARE SUCH, THAT

WHEREAS, THE ABOVE BOUNDEN Principal, RELIANCE CONSTRUCTION COMPANY, did on the 24th day of March, 1913, enter into a contract with the said City of Hood River, to construct, build, furnish all materials for, and in every way complete the work of paving Oak Street from Front Street to Fifth Street, Cascade Avenue from First Street to Fifth Street, Front and First Streets from Oak Street to State Street, Third Street from Columbia Street to State Street and Fourth Street

from Oak Street to Columbia Street, the full width of the roadway from curb line to curb line, doing the necessary work of excavation and filling or embankment, and placing of the necessary fir headers and the furnishing and placing of monument cases, in strict accordance with the plans and specifications attached hereto, and the terms of which and each of which, is expressly made a part hereof.

NOW THEREFORE, if the said Contractor shall well and faithfully perform all the covenants and conditions in said contract mentioned, and shall pay all claims or liens for labor, work or material furnished in or by or on account of the performance of the work under this contract, whether the same were furnished to or by contractors, sub-contractors, laborer or material man, then this obligation shall be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, the said Principal has hereunto set its hand and seal and the said Surety has caused these presents to be signed by its attorney-in-fact and its corporate seal to be attached hereto this 29th day of March, A. D. 1913.

RELIANCE CONSTRUCTION CO. (Seal)

By Joseph Paquet, Pres.

A. Giebisch, Secy.

NATIONAL SURETY COMPANY,

By Frank E. Smith,

Attorney-in-Fact.

Executed in presence of:

J. EIDEN.

Corporate Seals of
Reliance Construction Co.
National Surety Co.

KNOW ALL MEN BY THESE PRESENTS, That we, RELIANCE CONSTRUCTION COMPANY, a corporation organized and existing under and by virtue of the laws of the State of Oregon, and having its principal office in the City of Portland (hereinafter called the Principal), as principal, and the NATIONAL SURETY COMPANY, a New York corporation, duly authorized and empowered to become surety on bonds, undertakings, etc., in the State of Oregon (hereinafter called the Surety), as surety, are held and firmly bound unto the CITY OF HOOD RIVER, a municipal corporation of the County of Hood River, State of Oregon (hereinafter called the Obligee), in the full and just sum of nine thousand five hundred and 00/100 (\$9,500.00) dollars, lawful money of the United States of America, for the payment of which sum, well and truly to be made, the said Principal binds itself, its successors and assigns, and said Surety binds itself, its successors and assigns, jointly and severally, firmly by these presents.

THE CONDITIONS OF THIS OBLIGATION ARE SUCH, THAT

WHEREAS, the above bounden principal, RELIANCE CONSTRUCTION COMPANY, an Ore-

gon corporation, has entered into a contract with the City of Hood River, for the improvement of various streets throughout the said city with hard surface pavement; and

WHEREAS, the City of Hood River is desirous of being indemnified against any possible infringement of patent on account of the process used in laying said pavement.

NOW THEREFORE, if the said Contractor shall save the City of Hood River harmless of any and all loss or damage which it may suffer on account of or growing out of any suits which may be instituted against the said city by any person, persons or corporations on account of infringement of patent within a period of one year from date, then this obligation shall be void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the said Principal has hereunto set its hand and seal and the said Surety has caused these presents to be signed by its attorney-in-fact and its corporate seal to be attached hereto this 29th day of March, A. D. 1913.

RELIANCE CONSTRUCTION CO. (Seal)

By Joseph Paquet, Pres.

A. Giebisch, Secy. (Corporate Seal)

NATIONAL SURETY COMPANY,

By Frank E. Smith,

Attorney-in-Fact.

Executed in the presence of:

J. EIDEN.

(Corporate Seal.)

CITY OF HOOD RIVER, OREGON.

Record of Council Minutes, meeting Feb. 24,
1913.

A regular meeting of the Common Council was held on the above date at the regular time and place. Those present, Mayor Blanchar, Councilmen Schmeltzer, Stranahan, Staten, Robertson and Mayes, City Atty. Derby, Marshal Lewis and Recorder Howe.

Minutes of the last regular meeting read and approved as read.

Street Committee.

In the matter of street paving and basing their report on the recommendations of F. N. Bingham, consulting engineer, they recommend that the streets be paved with Hassam Cement Concrete pavement.

That the proposed paving district be confined to Oak Street from Front to Fifth; Cascade from Front to Fifth; Front from State to Oak; First Street from State to Oak; Second Street from State to Cascade; Third from State to Columbia; Fourth from Oak to Columbia, and recommend that the Judiciary Committee be instructed to bring in an ordinance covering the above recommendations by the next meeting.

Moved by Robertson 2d Stranahan, that the reports be adopted. Carried.

Moved by Robertson, 2d Stranahan, that Council adjourn. Carried.

(Signed) H. L. HOWE,
City Recorder.

Record of Council Minutes, meeting of March 3, 1913.

A regular meeting of the Common Council was held on the above date at the regular time and place.

Those present, Mayor Blanchar; Councilmen, Schmeltzer, Staten, Stranahan, Robertson, Mayes; Atty. Derby; Engineer, Morse; Marshal, Lewis and Recorder Howe.

The minutes of the last meeting was read and approved as read.

The Street Committee recommend that the matter of their report and recommendation of Feb. 24th on the street paving be reconsidered. Moved by Robertson, 2d Mayes, that the recommendation be adopted. Carried.

By unanimous consent of the Council the rules were suspended for the purpose of reconsidering the recommendation of Feb. 24, as to street paving. Moved by Mayes, 2d Stranahan, that the report of Street Committee of Feb. 24th recommending the paving of streets be reconsidered. Carried.

Moved by Mayes, 2d Schmeltzer, that the city pave with Hassam pavement or with concrete pavement. Carried.

The Judiciary Committee present the paving ordinance. Moved by Robertson, 2d Stranahan, that the same be received. Carried.

Ordinance No. 432 providing for the paving of Oak Street and other streets read for the first time. Moved by Mayes, 2d Stranahan, that ordinance 432 pass its first reading and be referred to the Street Committee. Carried.

Moved by Mayes, 2d Robertson, that Council adjourn. Carried.

(Signed) H. L. HOWE,
City Recorder.

Meeting of March 10, 1913.

A regular meeting of the Common Council was held on the above date at the regular time and place.

Present, Mayor Blanchar; Councilmen Schmeltzer, Stranahan, Staten, Robertson, Mayes, City Atty. Derby, Engineer Morse, Marshal Lewis and Recorder Howe.

Minutes of the last regular meeting were read and approved as read.

Moved by Mayes, 2d Robertson, that in Ordinance No. 432 line 6 of the title the word Cascade Avenue be changed to read Columbia Street. That the word "six" in line 20, Sec. 1, be changed to read "five," and that the date Mar. 17 in line 7, Sec. 5, be changed to March 24th. Carried.

Moved by Robertson, 2d Schmeltzer, that Ordi-

nance No. 432 be read the second time as amended. Carried.

Moved by Staten, 2d Stranahan, that the Section 5, Ordinance 432, be amended by adding to it the following: "or dollar-way pavement, according to plans and specifications filed with the city recorder by the date of the final passage of this ordinance." Motion lost.

The original motion was then put and carried.

Moved by Robertson, 2d Mayes, that Ordinance No. 432 be placed on final passage. Carried. Roll call, Schmeltzer, Stranahan, Staten, Robertson, Mayes, all present voting "yes," Ordinance No. 432 was declared duly passed.

Moved by Robertson, 2d Stranahan, that Council adjourn. Carried.

(Signed) H. L. HOWE,
City Recorder.

Meeting of March 24, 1913.

A regular meeting of the Common Council was held on the above date at the regular time and place.

Those present, Mayor Blanchar, Councilmen Taft, Schmeltzer, Stranahan, Staten, Robertson, Mayes; City Atty. Derby; Engineer Morse; Marshal Lewis; Health Officer Edginton; Recorder Howe.

Minutes of last meeting were read and approved as read.

Moved by Staten, 2d Schmeltzer, that the matter of paving be taken up at this time. Carried.

The bids as reported by the engineer:

Single Course Concrete:

Jeffry & Bufton	\$27,349.90
D. A. Williams	24,836.60
Reliance Construction Co.	23,374.95
E. I. Cantine	28,751.60
E. O. Hall	26,042.95

Hassam:

E. O. Hall	30,792.95
Oregon Hassam Paving Co.	35,156.60
Reliance Construction Co.	27,619.90

Moved by Stranahan, 2d Staten, that the bid of the Reliance Construction Co. for the single course concrete paving be accepted. Motion lost.

Moved by Robertson, 2d Mayes, that the bid of the Reliance Construction Co. for the five inch Hassam pavement be accepted. Carried.

Moved by Staten, 2d Mayes, that the mayor and recorder be instructed and authorized to enter into contract for the city with the Reliance Construction Co. for the five inch Hassam pavement as per their bid. Carried.

Moved by Mayes, 2d Robertson, that Council adjourn. Carried.

(Signed) H. L. HOWE,
City Recorder.

Minutes of April 7, 1913.

A regular meeting of the Common Council was held on the above date at the regular time and place.

Those present, Mayor Blanchar, Councilman Taft, Schmeltzer, Stranahan, Staten, Robertson, Mayes; City Atty. Derby; Engineer Morse; Marshal Lewis; Recorder Howe.

Minutes of the last meeting read and approved as read.

Communications from Carey & Kerr and one from the Oregon Hassam Paving Co. calling attention to the rights of the Hassam Paving Co. to lay Hassam pavement in the State of Oregon was read. Moved by Robertson, 2d Staten, that the matter be referred to the Judiciary Committee. Carried.

Bonds of the Reliance Construction Company were presented and approved. Moved by Robertson, 2d Mayes, that the bonds be accepted. Carried.

Moved by Robertson, 2d Stranahan, that Council adjourn. Carried.

(Signed) H. L. HOWE,
City Recorder.

Plaintiff introduced the following stipulation, being deposition of E. O. Hall.

(Title.)

It is stipulated and agreed that the deposition of E. O. HALL, a witness in behalf of the complainants, before Hon. Wallace McCamant, Master

in Chancery in the above entitled suit, shall be taken upon oath at Pittsburgh, Pennsylvania, before Mr. G. R. Brannon, Notary Public, at 547 Rosedale Street in the said city, upon the interrogatories and cross-interrogatories hereto attached, without commission. Also that objections to the competency, relevancy or materiality of any question or answer may be made before the said master, but all objections to the form of the deposition and the certificate of the officer thereto are waived.

It is also stipulated that the deposition may be taken in shorthand by a stenographer and when transcribed and signed by the said witness shall be returned by the said officer to the clerk of the above named District Court at Portland, Oregon.

Dated May 19, 1916.

CAREY & KERR,
Solicitors for Complainants.
RALPH R. DUNIWAY,
Solicitor for Defendants.

CERTIFICATE.

(Title.)

State of Pennsylvania,
County of Allegheny,—ss.

THIS IS TO CERTIFY that on this 14th day of June, 1916, at my office in the City of Pittsburgh, Pennsylvania, duly appeared the within named E. O. HALL, a witness in behalf of the

complainants in the above entitled suit, who being by me first duly sworn to testify to the truth, the whole truth and nothing but the truth as such witness, did thereupon depose and testify as herein shown. The said deposition was begun at the hour of ten o'clock A. M. and continued until completed on the same day, upon the interrogatories and cross-interrogatories and pursuant to the stipulation hereto attached. At the said time and place no appearance was made by attorney for either the complainants or defendants and the said deposition was taken subject to the conditions of the stipulation aforesaid, in shorthand by a stenographer and was thereupon by the said stenographer transcribed and was then and there read over by the said witness who then and there subscribed the same.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal the day and year first above written.

G. R. BRANNON,
Notary Public.

(Seal)

My appointment dated Dec. 8, 1915. My commission expires end next session of Senate.

(Title.)

INTERROGATORIES PROPOUNDED TO AND
ANSWERS GIVEN BY E. O. HALL OF
PITTSBURGH, PENNSYLVANIA, A WIT-
NESS ON BEHALF OF COMPLAINANTS, IN

ACCORDANCE WITH THE ATTACHED
STIPULATION:

Interrogatory 1.

Q. Please state your name, age, residence and occupation.

A. E. O. Hall. Age 45. Residence, 547 Rose-dale Street, Pittsburgh, Pa. Occupation, contractor.

Interrogatory 2.

Q. State whether you formerly lived at Hood River in Oregon and at what time?

A. Yes, from October 23, 1907, to June 6, 1914.

Interrogatory 3.

Q. State whether or not you are the E. O. Hall who made a bid for laying Hassam pavement in the streets of the City of Hood River, in accordance with the provisions of Ordinance No. 432 of the City of Hood River, in March, 1913?

A. I am.

Interrogatory 4.

Q. What was the amount of your bid for that work?

A. I am unable to state definitely.

Interrogatory 5.

Q. Were you present at the time the bids for the improvement under that ordinance were opened by the common council of the City of Hood River?

A. I was.

Interrogatory 6.

Q. State, if you can, whose bid was the lowest

bid and whose bid was next to the lowest for the Hassam pavement?

A. The Reliance Construction Company was the lowest bidder, and I was next to the lowest bidder. Interrogatory 7.

Q. Do you remember the amount of your bid, and if so, state the amount?

A. I cannot state the amount.

Interrogatory 8.

Q. Were you present when the contract was awarded by the common council of Hood River, Oregon, on the 24th day of March, 1913?

A. I was.

Interrogatory 9.

Q. Were you aware when you made your bid for the said work, that the process for laying Hassam pavement to be laid under the said ordinance was patented?

A. That was my understanding.

Interrogatory 10.

Q. At the time you made your bid did you know that a public offer had been filed with the city recorder of the City of Hood River by the Oregon Hassam Paving Company, to furnish any and all bidders to whom contracts might be awarded for laying the Hassam pavement in the streets of Hood River, Oregon, the right to lay such pavement upon the terms and conditions specified in the said offer?

A. I did.

Interrogatory 11.

Q. State whether or not you had, at the time of the opening of the bids, or prior to the letting of the contract under said ordinance, to Reliance Construction Company by the City of Hood River, knowledge of the offer made by the Oregon Hassam Paving Company to furnish to successful bidders the right to use the patented processes for laying that pavement, together with the services of an expert to give proper advice as to the laying of the pavement and to supply a double Hassam grout mixer and a steam roller and all skilled workmen necessary for operating the Hassam grout mixer, on payment to Oregon Hassam Paving Company of fifty cents per square yard of pavement laid?

A. I obtained this knowledge from Mr. Crane of the Oregon Hassam Paving Company; also I read the proposal of the Oregon Hassam Paving Company, on file with the city recorder of Hood River, Oregon.

Interrogatory 12.

Q. What was your intention, in making your bid, as to accepting or not accepting the offer aforesaid?

A. I intended to accept the offer of the Oregon Hassam Paving Co.

Interrogatory 13.

Q. What was your intention as to performing the contract if your bid had been accepted and the

street improvement contract had been awarded to you by the City of Hood River?

A. I would have accepted the proposal of the Oregon Hassam Paving Company, and entered into a contract with them as outlined in their proposal.

Interrogatory 14.

Q. In case you had been awarded the contract, state whether or not you would have accepted the general license offer of the Oregon Hassam Paving Company referred in the above interrogatories?

A. I would.

Interrogatory 15.

Q. In case the contract had been awarded to you, would you have paid the license fee of fifty cents per square yard as stipulated in the general offer referred to in the foregoing interrogatories?

A. That was my intention.

Interrogatory 16.

Q. Have you ever had any business relations with the Hassam Paving Company or the Oregon Hassam Paving Company?

A. None whatever.

Interrogatory 17.

Q. Are you, or have you ever been in any way interested in those companies or either of them?

A. No.

Interrogatory 18.

Q. Have you any interest in this suit?

A. None whatever.

E. O. HALL.

(Title.)

CROSS-INTERROGATORIES PROPOUNDED TO
AND ANSWERS GIVEN BY E. O. HALL OF
PITTSBURGH, PENNSYLVANIA, A WIT-
NESS ON BEHALF OF COMPLAINANTS, IN
ACCORDANCE WITH THE ATTACHED
STIPULATION.

Cross-Interrogatory 1.

Q. Did you know when you made your bid for said work that no court had ever held the process for laying Hassam pavement to be laid under the said ordinance, was covered by a valid patent?

A. I did not.

Cross-Interrogatory 2.

Q. Did you not believe when you made your bid for said work that under the process for laying Hassam pavement to be laid under the said ordinance, was not covered by a valid patent?

A. I had never investigated whether the patent was valid or not.

Cross-Interrogatory 3.

Q. Did you not know when you made your bid for said work, that the process for laying Hassam pavement to be laid under the said ordinance, that it was the opinion of many lawyers that said process for laying said pavement was not and could not be validly patented?

A. I never heard the opinion of any lawyer as to the validity of the patent of the Oregon Hassam Paving Company.

Cross-Interrogatory 4.

Q. Did you know the public offer filed with the city recorder of the City of Hood River by the Oregon Hassam Paving Company to furnish any and all bidders to whom contracts might be awarded for laying Hassam pavement on the streets of Hood River, Oregon, the right to lay such pavement, and which offer you have been asked about in direct examination, contained terms and conditions which made it impossible for any bidder to comply with said offer and bid in the same or less than the Oregon Hassam Paving Company did bid, unless said bidder was willing to lose money on the contract, if it should be awarded to him?

A. I did not.

Cross-Interrogatory 5.

Q. Did you know that Hassam pavement could not be laid under said ordinance in Hood River at said time for a cost of \$1.20 per sq. yd. to the contractor without paying any license to anyone?

A. I did not.

Cross-Interrogatory 6.

Q. Did you know that it would cost the Oregon Hassam Paving Company only 4c per sq. yd. to furnish the use of machinery and services of men which it agreed to furnish on this Hood River contract to any successful competitor who would comply with said offer?

A. I did not.

Cross-Interrogatory 7.

Q. Did you know that the Oregon Hassam Paving Co. only agreed to pay 15c per sq. yd. for the license to lay Hassam pavement to the Hassam Paving Co., and that the Oregon Hassam Paving Co., if said offer was complied with, would receive 31c per sq. yd. profit without giving any valuable consideration to the City of Hood River laying Hassam Pavement under a contract with any one other than the Oregon Hassam Paving Company?

A. No.

Cross-Interrogatory 8.

Q. Did you know that the Oregon Hassam Paving Co. made said public offer to fraudulently pretend to comply with the law, and to fraudulently pretend to give an opportunity for public competitive bidding on municipal contracts for public improvements to be paid by assessments on the property benefited when in fact said public offer was so made by the Oregon Hassam Paving Co. so it would charge an illegal profit of 31c per sq. yd. without any consideration to any competitor who got the Hood River job away from the Oregon Hassam Paving Co. and complied with said fraudulent illegal offer?

A. I do not know what the intent of the Oregon Hassam Paving Company was, but presumed that the council of the City of Hood River knew what they wanted, and asked for bids accordingly, but was not aware of any excessive profits.

Cross-Interrogatory 9.

Q. Did you know that the Oregon Hassam Paving Co. made said public offer to fraudulently pretend to comply with the law, and fraudulently pretend to give an opportunity for public competitive bidding on municipal contracts for municipal improvements to be paid by assessments on the property benefited, when in fact said public offer was so made that the Oregon Hassam Paving Co. would have an illegal advantage of 31c per sq. yd. without any consideration over any competitor in the bidding who would comply with said fraudulent illegal offer?

A. I was not aware of any fraudulent intent of the Oregon Hassam Paving Company but considered they had an advantage on account of patent rights.

Cross-Interrogatory 10.

Q. Did you know that it would cost the contractor to lay said Hassam pavement in Hood River under said contract more than \$1.20 per sq. yd, without said contractor paying any royalty or license fee to any one?

A. I did not.

Cross-Interrogatory 11.

Q. Is it not a fact that if you had been awarded the contract at Hood River on which you bid for Hassam pavement, that you could not have paid 15c per sq. yd. for the license, and made a profit on the job?

A. No, it is not.

Cross-Interrogatory 12.

Q. What did you figure it would cost you to perform this Hood River contract without paying any license fee?

A. About 83c per yard.

Cross-Interrogatory 13.

Q. Did you figure you would pay any license fee for laying this pavement when you put in your bid?

A. I did.

Cross-Interrogatory 14.

Q. If you answer the 13th cross-interrogatory yes, how much did you figure to pay for license fee to lay pavement, and to whom?

A. 50c per yard, and to the Oregon Hassam Paving Company.

Cross-Interrogatory 15.

Q. Did you ever lay any Hassam pavement in Oregon?

A. No.

Cross-Interrogatory 16.

Q. If you answer the 15th cross-interrogatory yes, state when and where it was laid?

Cross-Interrogatory 17.

Q. What was the price you received for laying said Hassam pavement?

Cross-Interrogatory 18.

Q. What did it cost you to lay said Hassam pavement?

Cross-Interrogatory 19.

Q. What license fee for laying Hassam pavement did you pay, and to whom?

Cross-Interrogatory 20.

Q. In case the contract had been awarded to you, and you would have paid the license fee of 50c per sq. yd. as stipulated in the general offer referred to in the direct interrogatories and cross-interrogatories, how much would it have cost you to have complied with your contract?

A. About \$1.33 per yard.

Cross-Interrogatory 21.

Q. Give the items of cost you figure in answering cross-interrogatory 20.

A. Rock	25c
Spreading and rolling	7c
Sand, cement and applying top...	45c
Incidentals	6c
Licensee	50c

Cross-Interrogatory 22.

Q. State what your financial condition was in 1913, and what your financial ability would have been to have paid a loss in performing this Hood River contract and paying a licensee fee of 50c per sq. yd.?

A. There was little chance for a loss, owing to the fact that I owned a rock crushing plant, near the city, and had several teams with which to do this work, and was enabled to furnish rock and material on the street cheaper than the Oregon

Hassam Paving Company. I never have had any trouble in taking care of any deficiencies in contracts I have entered into, either in 1913 or since, nor have I depended upon any Bonding Company to complete any of my work.

Cross-Interrogatory 23.

Q. Explain how you intended to handle the contract if awarded to you in regard to the claim of patent of the Hassam Paving Company people, and their demand of 50c per sq. yd. for a licensee fee?

A. I expected to pay the license fee, and do the work under the supervision of their men, and with the use of machinery stipulated in their proposal.

E. O. HALL.

(The evidence as taken down and transcribed by the official reporter and filed with the clerk of the court, and which evidence the complainants and defendants Reliance Construction Company have each got a copy of, is hereby referred to as inserted commencing with page 8 of said transcript of the testimony and continuing to the close of the testimony, as a part of the evidence in this case.)

Said testimony is in words and figures as follows:

R. J. STRAICHER is called as a witness for the complainants and being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by MR. CHARLES H. CAREY.

Q. Have you the books of the Reliance Construction Co.?

A. Yes.

Q. What are they?

A. Journal, Cash Book and Ledger.

Q. The Reliance Construction Co. is a corporation?

A. Yes.

Q. Will you give the names of the officers of the company?

A. I cannot do that, Joseph Packett was president, Mr. A. Giebisch was secretary, F. Joplin and Sorenson were also stockholders.

Q. Does your ledger show the account of the construction of the Hassam Paving contract at Hood River?

A. Yes. The account of the paving in the City of Hood River.

Q. I will ask you whether you have produced all of the vouchers and bills of the company with reference to that contract?

A. I have all the vouchers, but I have not got all the bills. I am not sure about three or four.

Q. What vouchers are there that you have?

A. Checks on the First National Bank, checks on the Butler Banking Co. of Hood River and the United States National of Portland.

Q. Have you the original payrolls?

A. Yes.

Q. The receipts and bill for all material that went into this job?

A. The books were balanced, the account was brought down as far as we had it.

Q. Was it summed up?

A. It was summed up, but the balance was not shown.

Q. Did you take a trial balance?

A. One or two, I think I took off a trial balance on January 1, 1914.

Q. Have you that here?

A. Yes, it is right here in the book.

Q. How much does that show the balance was?

A. It does not show a balance.

Q. How much did it show?

A. \$3,094.09.

Q. How much does the account show now on the books?

A. \$1,900.34.

Q. The entries you have made there made the difference?

A. The entries made there made the difference.

Q. What are those entries?

A. An interest charge of \$199.64, expense of \$604.82, and maintenance \$258.19.

Q. These items have been charged to the account since this proceeding before the master?

A. Yes, they should have been charged long before.

Q. What was the expense, \$604.82?

A. That was overhead expense.

Q. What do you mean by overhead expense?

A. Paying officers' salaries, my salary, postage stamps and what you would call expense.

Q. What proportion of the total expense do you charge to this particular contract?

A. I have it here, the total expense was \$6,579.39, I figured it 227/1000% of the total contract, here in the City of Weiser, the City of Hood River, this was the work that they did.

Q. In your last answer you refer to page 2 of the Journal and to the entry in the Journal of January 19, 1915?

A. Yes.

Q. When was that entry made?

A. Within about a week or so.

Q. These different jobs that are mentioned, were those all on hand at the time the Hood River job was going on?

A. I do not know as they were all on hand at that particular time, some of them were.

Q. How did you come to get such a percentage at this particular time?

A. Dividing the total amount of the contracts into the expense. The total contracts amounted to \$299,683.88 and the total amount of the expense \$6,579.39.

Q. Please produce the trial balance that you say you made on a previous occasion?

A. Witness shows trial balance.

Q. That is on page 175 of the Ledger?

A. Yes.

Q. That is dated January 31, 1914?

A. Yes, sir.

Q. At the time you drew off that trial balance, did you make any entry such as these that are shown in your Journal on page 208, January 19, 1915?

A. Well, some of them were made January 19, and these I presume were made after that time.

Q. What I am getting at is, at the time you made this trial balance January 31, 1914, you had not made any apportionment?

A. No distribution of overhead.

Q. On the expense of these different jobs?

A. No.

Q. Did the Reliance Trust Co. make its annual report to the United States Government?

A. I believe so, I did not make it.

Q. Do you know how it was made up for the year 1913?

A. No, sir.

Q. Have you got a copy of that?

A. No.

Q. Do you know whether in making that up you made any of these charges against this business

that you have put in the books within the last few days?

A. I do not know, I did not make it up.

Q. I am asking if you know?

A. I do not.

Q. Now you know the government will not permit entries to be made a year after the transaction?

A. I do not know that.

Q. You have not taken that into consideration in making these book entries at this time?

A. No, they just asked me to bring the books down and I did so.

Q. But you did not date it when you made the entry but dated it back to January 19, 1915?

A. That was the last entry.

Q. Why did you take that particular date?

A. Well, all our jobs were closed up and the books were supposed to be closed on this date.

Q. Page 1 of the Journal of the Reliance Construction Co. contains the first entry of transactions of that company?

A. They did not carry a Journal for quite awhile. That should have been the first entry. (Showing on the books.)

Q. You now point to the entry of date Aug. 28, 1912, upon page 2 of this Journal?

A. Yes.

Q. Then did the Reliance Construction Co. begin business about August 28, 1912?

A. That is the time that the certificate of the state showed that they were a corporation.

Q. They began business as a corporation?

A. They began business as a partnership.

Q. When did they incorporate the business?

A. About that time.

Q. The Reliance Construction Co. as a partnership did some business prior to August 28, 1912?

A. Yes, under the name of Packet, Giebisch & Joplin, prior to that date.

Q. The firm that you speak of is different from the firm of Giebisch & Joplin?

A. Yes, sir.

Q. Giebisch & Joplin have been in the general contracting business for a great many years, have they not?

A. They have been in the paving business about three or four years.

Q. They have been in the general contracting business for a good many years?

A. They have for six years that I know of.

Q. Do you mean that that is all?

A. That is all that I know of, they probably were before but I do not know how many years.

Q. Now this corporation, the Reliance Construction Company, began business as a corporation about Aug. 28, 1912?

A. Yes.

Q. So all of these jobs that are mentioned here in your Journal page 2 under date of January 19, 1915, is that overhead expense for different jobs that were taken by the corporation or are they jobs that were taken by the former firm of Packet, Giebisch & Joplin?

A. I think they were all taken by the Reliance Construction Company.

Q. Those that were taken since Aug. 28, 1912?

A. I think so.

Q. Well, how could we be sure about it?

A. Look at the original contracts, I presume.

Q. I notice the first date mentioned in your Journal is Sept. 15, 1913, Hood River Paving, is that the first job that the Reliance Construction Company did?

A. No.

Q. What other jobs did it do prior to that?
(Witness looks at Ledger.)

Q. Don't your Journal show such things as that?

A. No.

Q. How do you write up your Ledger then if you do not have the Journal entries beforehand?

A. Make the entries direct from the cash book.

Q. Does your cash book show?

A. Yes.

Q. Where is the cash book?

A. Over there (pointing to book).

Q. I would like to see what the first entry is of jobs done by the Reliance Construction Company.

A. The first entry is an item of 50 cents, I think, Feb. 9, 1912.

Q. That was before the company was incorporated?

A. I said about that time, I was not sure.

Q. Now, you were going to give me the jobs that were on hand when the Reliance Construction Company began business as a corporation?

A. The job at Weiser and the job at Boise.

Q. And after the corporation was organized?

A. Arlington and Hood River.

Q. Were these all the jobs?

A. No, there were one or two little sewer jobs.

Q. How were the bills for these jobs paid, by checks of Giebisch & Joplin?

A. Not entirely, no.

Q. You say "Not entirely"; what other way were bills paid by the Reliance Construction Company?

A. Paid by checks on the United States National Bank signed by Packet, Giebisch & Joplin,—by checks on the Reliance Construction Company, Hood River and Arlington,—time checks on the First National Bank at Hood River. Giebisch & Joplin paid the time keeper, and checks on the Butler Bank by the Reliance Construction Com-

pany and by checks on the First National Bank of Idaho, I think. I believe that is all.

Q. Where did the Reliance Construction Company have a bank account?

A. A bank account at Hood River.

Q. On what bank?

A. The Butler Bank.

Q. Any place else?

A. The Arlington State Bank, Arlington, the First National Bank of Boise, Idaho, and the First National Bank of Weiser, Idaho.

Q. Is that all?

A. That is all, I believe.

Q. Now, you say these expense items for the job at Hood River were not all paid by checks of the Reliance Construction Company but were partly paid by checks of Packet, Giebisch & Joplin and also by time checks?

A. I said all the bills were not paid by checks. The cash book will show what was paid. I can check them off if you care to go over it.

Q. Is there any way by which an accountant can ascertain what part of these expense items that were paid by Packet, Giebisch & Joplin's checks were properly apportioned to the job at Hood River by the Reliance Construction Company?

A. I presume he could.

Q. In what way?

A. By checking over the cash book and vouchers.

Q. Let me see,—the cash book would only show the items that were apportioned in that book to the Reliance Construction Company on the Hood River job and the vouchers would be the vouchers of the firm and might also cover items of other business of that firm, might they not?

A. I do not know as they would, though they may. It is possible.

Q. What method did you use, for instance, to ascertain how much of the bills for material paid for by Giebisch, Joplin or Packet or by Packet, Giebisch & Joplin should be charged to the Hood River job by the Reliance Construction Company?

A. What kind of material do you refer to?

Q. I do not intend to particularize, but to begin with, say, cement,—suppose Packet, Giebisch & Joplin paid a bill for cement, how would you ascertain what part of that bill should be charged to the Hood River job, in this account?

A. Checks on the Reliance Company.

Q. If Giebisch & Joplin paid for the cement and used part of it on one job and on another job including perhaps some portion of it that was sent to this Hood River paving job, how would you tell what proper apportionment you should make of the account?

A. From the reports turned in by the man on the works.

Q. Are any of these reports among the vouchers?

A. They are here.

Q. In which accounts?

A. Most all I guess, if there are any missing I do not know it.

Q. Take for instance this voucher headed "Giebisch & Joplin, General Contractors, No. 9101, Hood River, Or., June 2, 1913, the bearer G. W. Monroe No. 62 has worked 6 days at \$2.50 in the month of May, amounting to \$15.00. Signed Giebisch & Joplin, per Jackson, Superintendent, marked paid in full \$15.00 marked paid June 2, 1913, how do you know that the person mentioned in that voucher worked 6 days on the Hood River job?

A. What date?

Q. June 2, 1913.

A. In the pay roll from May 24th to June 6th, 1913, you find No. 62 worked 4 hours on the 24th, 9 on the 26th—

Q. Never mind the details.

A. Time check 90901 marked \$15.00.

Q. Now did Giebisch & Joplin pay that \$15.00?

A. The Reliance Construction Company paid it. The money was furnished to the First National Bank of Hood River.

Q. Well, the account in the bank was in the name of Giebisch & Joplin?

A. Yes.

Q. And this voucher that I am asking you

about is a check payable to bearer for \$15.00 on account of work done by G. W. Monroe on the days named and it was paid out of the Giebisch & Joplin account?

A. Yes.

Q. Now, what proof have you that the man worked on this paving job and not for Giebisch & Joplin on some other job?

A. The pay roll states that he worked on this job, any further than that I cannot say. I was not on the job and I only get my knowledge from the reports turned in.

No cross examination.

(Witness excused.)

JOHN H. CRANE is called as a witness for the complainant and being first duly sworn, testified as follows.

DIRECT EXAMINATION.

Questions by MR. C. H. CAREY.

Q. Mr. Crane, are you an officer of the Oregon Hassam Paving Company?

A. Yes, sir.

Q. What is your official position?

A. Vice president and manager.

Q. How long have you been in that position?

A. Something over five years.

Q. Where?

A. In Portland, Oregon.

Q. Prior to that time were you connected with the Hassam Paving Company?

A. I was manager of construction for the Hassam Paving Company at Worcester, Massachusetts.

Q. There has been introduced in evidence here a license contract between these companies fixing the license for the district in which the Oregon Hassam Paving Company is operating at 15 cents per yard, will you state how generally that license fee is charged by the Hassam Paving Company?

A. When I was in that company that was the general fee charged contractors throughout the United States and also as far up as Montreal, Canada.

Q. Has there been any change since that time?

A. I have not heard of any change.

Q. State whether or not the Hassam Paving Company has had that rate in other places in the United States and Canada, and if so, where?

A. They have. One firm in Niagara Falls paid it, and another one in St. Joe, Mo., Radcliff & Gibson was the name of the firm. They had another one in Texas, I think it was in Waco, if I remember right. Simpson Bros., general contractors, in Boston and in Hartford, Conn., and the Hassam Paving Company, Limited, of New Westminster, B. C., and in Spokane, Wash., there was the Inland Empire Paving Company, they paid 15 cents.

Q. What I am getting at is whether this is the usual and customary license fee?

A. Yes, that was the general set amount.

Q. Now state whether or not the Oregon Hassam Paving Company during the years that you have operated that company as vice president and general manager has paid that amount to the Hassam Paving Company?

A. We have paid it according to contract every month. We remit to them the amount. We render an account of the number of yards laid the previous month and send them a check for the royalty.

Q. Now, the Oregon Hassam Paving Company was one of the bidders for this contract at Hood River as shown by the records of the proceedings of the City of Hood River, Exhibit B, offered in evidence here; do you recollect at what rate per yard your company bid for the laying of this Hassam paving at Hood River?

A. Yes, we bid \$1.70 per square yard.

Q. I see by this record there was another bid by Mr. E. O. Hall, did you know Mr. Hall?

A. I did.

Q. Where does he live?

A. Pittsburgh, Pa.

Q. Where did he live at that time?

A. I believe two or three miles outside of Hood River.

Q. Did you have any arrangement with Mr. Hall for the payment of a royalty of \$.50 per square yard, your company to furnish certain machinery &c., as shown by the record in evidence here?

A. I did.

Q. What was that arrangement?

A. After the bids were submitted to the Council of Hood River I checked them over and I saw that he was the second bidder, and I asked him what his intentions were in regard to the payment of the royalty and he said that if he was awarded the contract that he intended to accept our proposition of 50 cents per yard, we to furnish the necessary machinery and superintendence.

Q. Do you remember, Mr. Crane, about how much his bid was for this paving?

A. I think \$1.50 per square yard.

Q. And in the same connection I believe it has been stated here that the bid of the Reliance Construction Company was \$1.35 per yard?

A. \$1.35 if I recollect right.

Q. Referring now to your license offer filed with the city recorder of Hood River, I wish you would explain to the master just what that covers and how the charge was based.

A. We agreed to furnish to any successful bidder who secured the contract for laying Hassam paving a grout mixer suitably designed and built for mixing the concrete that entered into the construction of the paving and also a man to run the same and two steam rollers necessary for rolling the pavement and a superintendent to act in an advisory capacity for laying the paving and to see that it was laid according to specifications, togeth-

er, of course, with the privilege of using the process.

Q. Then on such a successful bidder taking the contract and accepting your offer and paying you the 50 cents per yard you were to furnish this machinery as specified?

A. Yes.

Q. How much of the 50 cents would be net to you?

A. We would have to pay the Home Company 15 cents and the shipping the machinery both ways and furnishing a man, I would say possibly 4 or 5 cents a yard, probably 20 cents a yard it would cost. That is to say we would pay the Home Company and the expense of shipping the machinery and the wages of the men while the work was in progress.

Q. Well, then, assuming that the Hassam Paving Company would get its license fee of 15 cents, you would have received the balance less 4 or 5 cents per yard?

A. Yes.

Q. Just give us a little more in detail, how you get that 4 or 5 cents on this particular job?

A. Well, I believe I estimated the job would last two months up there, and the superintendent's pay and a man to run the grout mixer and the freight on the machinery back and forth, and taking the amount of these expenses and dividing it by the

number of square yards, I think the result would give 4 or 5 cents a square yard.

Q. Will you state whether or not you had a similar offer on file in Portland, Oregon?

A. Yes.

Q. You were doing municipal paving in Portland?

A. Yes.

Q. Now how would the 50 cents, including the Hassam Company's royalty of 15 cents and the items that you were to furnish compare with the customary profits of your company on that kind of work?

A. For different years our profits showed different averages. Take 1911 our books will show we made 32 cents and a fraction of a cent profit after paying our royalty, which including the royalty would be about 47 cents per yard. That is before we paid the royalty we would have about 47 cents a yard profit.

Q. That was 1911, how about 1912?

A. In 1912 I think our profits were larger. I think they varied from 36 cents to 46 cents, something like that.

Q. I show you a tabulated statement here and will ask you what that is?

A. That is a copy of each contract, taken from our books and the price received per square yard and the cost of the material that entered into it

per square yard, and the royalty charges, the labor charges per square yard, and the bond per square yard and the water per square yard and the total cost of the contract and the profit on the same.

Q. Does it show the price of the material?

A. Yes.

Q. And of the labor?

A. Yes.

Q. And the amount received for each of these contracts?

A. Yes.

Q. You said it showed a copy of the contract, you do not mean a literal copy?

A. No.

Q. This is a recapitulation of the contract?

A. Yes, of the result of each contract.

Q. For what year?

A. 1911.

Q. Is that a correct statement from the books of your company?

A. It is.

Q. And what was the purpose of making up this statement?

A. For reference so as to enable us to estimate on future work.

Q. State whether or not you made up a detailed statement of the business of the Oregon Hassam Paving Company covering these different items you have explained for each year?

A. At the expiration of each job, when the job was closed, the superintendent made out a statement of the entire contract, subdivided in this form and gave it to me and I filed it away, and then at the end of the year, every contract that was completed was taken from the books in detail in this manner, and we kept all these for future reference.

Q. It was then prepared for statistical purposes in the company's business?

A. Yes.

Counsel for complainant offers in evidence the summary statement referred to by the witness.

Counsel for defendant objects to the offer as incompetent, irrelevant and immaterial and not the best evidence.

The document is received subject to the objection and filed marked Complainants' Exhibit 3.

Q. I show you a similar statement or summary purporting to cover the year 1912 and will ask you whether that was made up in the same way as described by you for the year 1911?

A. It was.

Q. Will you state whether or not that is correct?

A. It is correct.

Q. Based upon your books of account?

A. It is taken directly from the books.

Counsel for complainant offers in evidence the

statement referred to. Same objection as last noted and same ruling. The statement referred to is received and filed marked Complainants' Exhibit 4.

Q. I show you a similar statement purporting to be a recapitulation of the same kind for the year 1913, will you state whether or not that is made up from your books?

A. It is.

Q. Is that a correct statement?

A. It is.

Counsel for complainants offer in evidence the statement last shown the witness. Same objection as heretofore noted to the last two exhibits offered. Same ruling. The statement referred to is received and filed in evidence, marked Complainants' Exhibit 5.

Q. Will you state, Mr. Crane, whether or not your company was financially able to perform had it taken the contract at Hood River?

A. It was.

It is stipulated that the complainants have a monopoly under their patent for the Oregon District in which the contract was taken by the Reliance Construction Company, and that the 50 cents license fee was fixed by the Oregon Hassam Paving Company so that any one taking a job would pay to the Oregon Hassam Paving Company all the profits the Oregon Hassam Paving Company would make by taking the job itself and the effect

of it was to secure the Oregon Hassam Paving Company under it a monopoly. That was the object of it, to protect their monopoly under their patent.

Q. What is the capital of your company?

A. \$150,000.

Q. How much cash did your company have in the bank at that time?

A. I think probably between forty and fifty thousand dollars.

Q. Did your company have any bank credit at that time?

A. It did.

Q. Arranged for?

A. Yes.

Q. With what bank?

A. The Canadian Bank of Commerce.

Q. To what extent?

A. In 1913 we had a credit of \$300,000.

Q. So with the financial resources available, you could have carried on thi contract, had it been awarded to you?

A. We could.

Q. Was your company at that time engaged in the business of laying these Hassam pavements in this district,—the Oregon country that is mentioned in the license of the Hassam Paving Company?

A. We were.

Q. To what extent?

A. By referring to the year 1913, I think we completed in the City of Portland that year 126 thousand and some hundred square yards.

Q. Will you state whether or not at that time you had the necessary equipment that would be required to carry on this job at Hood River?

A. We had.

Q. Consisting of what?

A. We had six rollers, three ten tons and three six tons, seven Hassam grout mixers and all the small tools that are necessary for constructing that type of pavement.

Q. What is the fact as to whether or not prior to advertising for bids on this contract, the City of Hood River had negotiated with your company for laying the Hassam pavement under the Hassam patents in the City of Hood River, upon this job?

A. One of the councilmen from Hood River; I do not remember his name, came into the office and asked me if we would go to Hood River and submit a bid for laying Hassam pavement. I directed him out over work and he made a personal examination of our work. So I went to Hood River and interviewed Mr. Robertson, who was councilman, and Mr. Blanchard, the Mayor, and Mr. Mays, who was a councilman, and some others, I do not remember their names. It was generally stated by all of them that they preferred the Hassam paving. I believe they went so far as

to specify it on the records of the city that when they called for paving it was exclusively for Hassam. Later on they thought if they left it in that way we might hold them up on the price more than they cared to pay, so they thought they would add in another pavement to compete against us and they introduced ordinary concrete as a basis for keeping us within a reasonable price for our paving. However, they said that they preferred Hassam. Later on when the bids were received some of the council made a motion to have the ordinary concrete considered and it was immediately overruled by the majority and the bid of the Reliance Construction Company for laying Hassam was accepted.

Q. That is shown by this record, Exhibit B, is it not, Mr. Crane?

A. Yes, that is all shown in the record.

Q. Now, then, in pursuance of the invitation of the City of Hood River, your company did make a bid at \$1.70 as you have stated?

A. Yes.

Q. And you have testified that your company were prepared and had the equipment and the capital and could have taken that contract?

A. Yes.

Q. I will ask you then whether you were prepared to and could have furnished the grout mixer and the superintendence &c, that would be re-

quired to carry out your offer to other bidders?

A. We could.

Q. Now prior to this contract which is dated March 24, 1913, did your company put on file with the city recorder of Hood River the license offer which has been referred to here?

A. Yes, I think that was filed a week prior to receiving bids.

Q. When the contract was let it contained a provision found on page 19 of Exhibit "B" as follows: "Section 25. All fees or royalties for any patented invention, article or improvement that may be used upon or in any manner connected with the work or any part thereof connected with these specifications shall be included in the price mentioned in the contract and the contractor shall provide for holding harmless the city against any and all demands for such fees or royalties and before the final payment is made on the contract, the contractor must furnish acceptable proof of and procure satisfactory release from all such claims." Was there any discussion of the Hassam patent at the time the contract was let and how did this provision come to be inserted in the contract?

A. I informed the city authorities that our process was patented and if anybody laid it without conforming to our offer that was on file that we would bring suit and that in order to protect themselves, for if we got judgment we certainly would go after the city later on for what we had been

damaged, and they talked the matter over with their attorney and as I understand it they had that clause inserted.

Q. The record, Exhibit B, also shows that a bond to protect the city from claims on account of the patent was furnished by the successful bidder, the Reliance Construction Company. What do you know about that?

A. We wrote up a letter to the Recorder and asked him if a bond had been filed and if so to mail us a copy, and he did so.

Q. Now then, did you take up negotiations with Packet, Giebisch & Joplin and with the Reliance Construction Company or any or all of those persons with reference to your license charge of 50 cents?

A. We notified the Reliance Construction Company and also Giebisch & Joplin that our process was patented and that there was such an agreement on file at Hood River.

Q. You refer to the offer filed with the City Auditor under date of March 18, 1913?

A. Yes.

Q. In the interim between March 18th and March 24th when the contract was signed by the Reliance Construction Company, did you have any talk with the officers and members of that company about these patents?

A. No, they never acknowledged receipt of our correspondence.

Q. Now Giebisch & Joplin, it is stated here, were contractors engaged in general contracting and the making of pavement, will you state whether or not they competed in any way prior to the letting of this contract in the laying of pavement with the Oregon Hassam Paving Company, and if so to what extent?

A. I do not remember that they did prior to this bidding on the Hood River contract. I do not recall any particular job where they were competitors in the paving business prior to 1913. We did not put in any stone block, we simply put in Hassam exclusively.

Q. You mean that they did not compete with you on this Hassam?

A. No. I do not remember prior to 1913 of their being competitors.

Q. What were they laying?

A. I believe they laid wood block pavement and stone block pavement.

Q. Then as I understand you to say, this Hood River contract was their first contract for paving where they competed with your company?

A. I do not know, in 1912, coming to think about it, I believe they laid in Arlington some 30,000 square yards of concrete paving that was in competition with Hassam.

CROSS EXAMINATION.

Questions by MR. R. R. DUNIWAY:

Q. Who is Mr. E. O. Hall?

A. I never met him before that evening there, he represented himself to be a contractor.

Q. You had no personal knowledge?

A. No.

Q. Either before or since?

A. No, I never met him before or after.

Q. Now this testimony about this 15 cents per yard, that was an agreement from the Hassam Paving Company to subsidiary companies for a license?

A. That was the price they charged auxiliary contractors.

Q. When was that charge instituted?

A. Upon the signing of the contract between anybody caring to use the process with the home company.

Q. When did the home company first commence to make that charge?

A. As early, according to my recollection, as 1906 or 1907.

Q. What did the home company furnish for this 15 cents?

A. They did not furnish anything except the privilege of using the process.

Q. Is it not a fact that the home company gave the privilege or sold the privilege of using the Hassam patent for less than 15 cents a yard?

A. Not for laying so-called Hassam paving.

They have for laying Hassam foundation to use on other kinds of pavement such as wood block or for the foundation laid for Leana Mix.

Q. What is the charge for that?

A. I know of one instance in the City of Worcester where they made a price for the foundation of 7 cents per yard.

Q. That is the lowest charge for using their process that you know of?

A. As far as I know.

Q. Has not the home company allowed the process to be used without any charge?

A. Not to my knowledge.

Q. What deduction or discount did they give on this 15 cents charge?

A. Nothing.

Q. Who paid the 15-cent charge?

A. This company for one,—the Oregon Hassam Paving Company.

Q. What others?

A. The Radcliff & Gibson Company.

Q. To what amount?

A. They paid 15 cents a yard for a number of years while I was with the home company. I do not know the total yardage of their contracts.

Q. At St. Joseph, Mo.?

A. Yes.

Q. Who else paid the 15 cents?

A. Reed & Coddington of Niagara Falls, N. Y.

I let that contract myself when I was with the home company.

Q. To what extent did they pay it?

A. I cannot say their yardage, I cannot remember.

Q. Was there any of them did not pay?

A. Not to my knowledge.

Q. Are there any other companies?

A. Simpson Bros., a corporation of Boston, they paid 15 cents.

Q. To what extent?

A. I do not know that I can say, I know they laid some every year, I estimate from 30 to 50 thousand yards a year.

Q. Did not the home company acquiesce in this process being used by individuals and firms without paying any royalty or license to the home company?

A. Never.

Q. Has it not been laid without paying any royalty or license to the home company?

A. Only by infringers laying it.

Q. Infringers?

A. This is the only case that has been prosecuted. They were anxious to get the patent into court to get an adjudication.

Q. Is it not a fact that what you term infringements had occurred in other Circuits other than the 9th Circuit and that the Hassam Company have made no effort or attempt to prosecute?

A. No, I do not think they are the kind of people, if there was an infringement that they would not prosecute.

Q. You do not know of your own knowledge that there are any infringements?

A. In the past five years I do not know of any, prior to that when I was with the home company I do not know of any.

Q. During the last five years you do not know to what extent there were what you call infringements that have not been prosecuted?

A. I do not know of any other infringement in the last five years.

Q. Now then, this Hassam grout mixer, does that differ from any other grout mixer?

A. It is different from any one I ever saw.

Q. There are other mixers that will do the work?

A. I presume it is possible.

Q. Now the Reliance Construction Company, what kind of a grout mixer did it use?

A. I would say very similar to our type.

Q. Then it is perfectly feasible to lay Hassam paving with a mixer that is not a Hassam grout mixer?

A. I think you might.

Q. But there is a Hassam grout mixer, so-called?

A. There is a patent on it.

Q. That is not essential to the laying of this concrete substance that you call Hassam?

A. You might substitute one.

Q. Now, what was the wages of this superintendent provided for in the license?

A. Five dollars a day.

Q. What were the wages of the man who ran the mixer, the Hassam grout mixer?

A. I think he got as high as \$5.00 a day.

Q. In your license fee you agreed to furnish steam rollers and to operate them?

A. Just furnished the rollers.

Q. What is the reasonable rent per day for a steam roller?

A. I would expect \$15.00 a day for a steam roller if I was letting them out.

Q. So \$15.00 a day would be a reasonable rent for each steam roller?

A. Yes.

Q. This was covered by your license fee?

A. Yes.

Q. What would be a reasonable rent for the Hassam grout mixer?

A. Well I do not know, we never rented it.

Q. What would a grout mixer cost?

A. I think about \$1,000.00.

Q. What is the life of one of them?

A. They would be some account for five years.

Q. They are not a short lived machine at all?

A. No, they would last fully five years.

Q. And how long a time does it take to lay this pavement?

A. The contract allowed the contractor 75 days. I figured that two months would be sufficient time to lay the pavement.

Q. As a matter of fact you do not know how long it did take to lay this Hassam pavement at Hood River?

A. No.

Q. Is it not a fact that this license agreement filed up here at Hood River at 50 cents a yard was so planned that it would not be possible for any one bidding on the Hassam pavement at Hood River to pay the license fee and lay the pavement and make any money at it?

A. No, I estimated that that would be the profit our company would make if we secured the contract and we based the license agreement on that estimate.

Q. Well your company lays Hassam pavement as cheap as any company do not they?

A. I do not think it does in many instances.

Q. Has not your company got as good facilities for laying this pavement at an economical cost?

A. I think so.

Q. Then why would not your company lay Hassam pavement as economically as any company?

A. I think they are able to do so.

Q. Then the 50 cents license agreement was filed up at Hood River so that any other person could not pay the 50 cents license fee and pay the cost of laying the pavement without going higher than what you gentlemen bid on the work, is not that true?

A. No, they could pay 50 cents very readily.

Q. What profit would be left at \$1.70 and pay you a fee of 50 cents?

A. Well, I do not know how cheaply they could construct their work; I presume they could do it for \$1.20.

Q. Well how much profit do you figure if it cost \$1.20 and they pay 50 cents license fee on a bid of \$1.70?

A. Well surely 5 cents.

Q. Just explain that a little more fully?

A. No, it would be just even.

Q. Then, as a matter of fact, it would not be possible for anybody to bid on this job at Hood River less than your company put in a bid and pay the 50 cents and make any money?

A. They would be very apt to lose money at less than we put in our bid and pay the 50 cents. They would not make any money.

Q. Did you explain that to Mr. Hall when you had that conversation with him at Hood River?

A. No, I did not go into details with him.

Q. As a mater of fact, if Mr. Hall had been

awarded the contract and had paid your company 50 cents, he would have lost money on the job, would not he?

A. He told me he could furnish the rock at a very low price.

Q. As a matter of fact, don't you know that rock up at Hood River would cost Mr. Hall or anybody substantially what your company would have to pay for it?

A. No, I took his word for it. I presume he knew what he could get rock for. He said he was familiar with that character of work.

Q. What did you people figure you would have to pay for rock at Hood River?

A. I think around \$2.00 per yard.

Q. Where did you expect to get your rock?

A. I think we could have got some from Mr. Hall and some from the Riverside quarry.

Q. What price did Mr. Hall quote you on the job?

A. I do not remember.

Q. What did the Riverside people quote you?

A. I think I figured their rock at \$2.00.

Q. That would be at the quarry?

A. I do not remember.

Q. Cannot you tell us what Mr. Hall charged you people or would charge you people if you got the job?

A. I do not remember.

Q. You say Mr. Hall could not furnish all the rock?

A. Not as fast as we would want it.

Q. Do you know what it cost Mr. Hall to get rock at his quarry?

A. I never went out to look at it.

Q. So you had no way of telling if Mr. Hall could furnish rock any cheaper than any one else?

A. Just his word for it.

Q. Do you know anything about Mr. Halls' financial responsibility?

A. No, I never looked into it.

Q. Has your company ever laid any Hassam at Hood River?

A. No.

Q. Do you know what is the highest price Hood River has ever paid for paving?

A. No, I do not.

Q. As a matter of fact is not that the first and only piece of Hassam pavement that has ever been laid in Hood River?

A. I think so.

Q. As a matter of fact is not Hood River a small place and there is no demand for Hassam pavement other than this one job?

A. I do not know. I do not know what the demand might be.

Q. At the present time that is the only piece of Hassam pavement in Hood River?

A. As far as I know.

Q. Now you have testified about negotiations with the council of the City of Hood River for Hassam, will you tell us at what price the Hood River council was estimating they would pay for Hassam pavement?

A. No, I could not tell you what they estimated it.

Q. They did not explain to you the highest rate they were willing to pay for Hassam pavement?

A. No, they asked me about what the price would be.

Q. What did you tell them?

A. I said, about \$1.70.

Q. As a matter of fact, what is the lowest price your company has laid Hassam for?

A. I think we have gone down as low as \$1.25.

Q. Whereabouts?

A. In the City of Portland.

Q. When?

A. This year sometime.

Q. What quantity did you lay in Portland at that price?

A. I do not know that we have laid any. I think we have a contract to lay some at that price.

Q. Any quantity contracted at that price?

A. I think 1900 yards.

Q. What royalty do you pay the home company now?

A. Fifteen cents.

Q. Was there any special reason for quoting the rate of \$1.25?

A. We just wanted to get the work.

Q. What was the lowest price prior to this year that your company has quoted for Hassam pavement?

A. I think in 1913 we might have got as low as \$1.50.

Q. That was laid in Portland?

A. Yes.

Q. At what price did Miller & Bauer when they were laying Hassam for your company, lay the pavement for?

A. From the books, after I took charge of the company, they got as high as \$2.00 and as low as \$1.75.

Q. Did they lay any less than \$1.75?

A. I do not think so.

Q. During what years?

A. I do not know just when they started, probably 1908 and 1909 and 1910, probably some in 1907.

Q. Now, you say the City of Hood River preferred Hassam pavement?

A. They did.

Q. That is regardless of the price?

A. Well, they did not commit themselves. They asked me how much it cost and I told them our price here in Portland was about \$1.70 and they did not say one way or the other.

Q. Did not they make their specifications call for concrete or Hassam?

A. They did after they passed the resolution calling for Hassam exclusively, they added ordinary concrete for the specifications in competition with Hassam pavement.

Q. Was that change not made because of the price you intimated you would charge for Hassam, if they specified Hassam alone?

A. I do not think so.

Q. Was not that change made to see whether or not they could get Hassam about as cheap as they could get concrete pavement?

A. No, I do not think so.

Q. Were you not informed by the authorities of Hood River that if they could not get Hassam substantially as cheap as they could get concrete pavement, no contract would be let at Hood River for Hassam?

A. No.

Q. You spoke about notifying the City of Hood River that you would go after them for a violation of the patent, as a matter of fact, did you make any effort to prevent the City of Hood River from laying that Hassam pavement?

A. No.

Q. As a matter of fact, have you done anything other than try to collect from the Reliance Construction Company and the surety for this alleged violation of the Hassam patent?

A. I think I was instrumental in having the Hood River people secure a bond to protect themselves.

Q. You are not proceeding for damages against the City of Hood River?

A. No, not yet.

Q. Can you explain how E. O. Hall came to file a bid at Hood River?

A. No.

Q. Did he have any understanding or agreement with you or the Hassam Paving Company about putting in that bid?

A. No, I never met the gentleman until he introduced himself to me in the city council chamber.

Q. Do you know whether he ever laid any pavement or not?

A. No, I do not.

Q. The Reliance Construction Company took the position, did they not, that the Hassam patents were not valid and binding patents?

A. Apparently they took that position.

Q. The Reliance Construction Company contested with your company the legality of the patent, did they not?

A. They were in the suit, I do not know what they did.

Q. As a matter of fact there has been no adjudication of the validity of the Hassam patent prior to this litigation?

A. No.

Q. Then, prior to the bidding at Hood River the patent had not been adjudicated to be a valid patent?

A. No.

Q. You know, do you not, that the Reliance Construction Company was advised by practicing attorneys that the patents were not valid patents for Hassam paving?

A. No, I do not know that.

Q. You know that Mr. Hall's quarry at Hood River was not capable of furnishing rock for this job, do you not?

A. I never investigated it.

Q. Did you not know from other sources that his quarry could not furnish rock for this job?

A. No.

Q. Did you not say you figured on getting part of the rock from Mr. Hall's quarry?

A. He told me he could furnish about half the rock, provided we were awarded the contract.

Q. What expectation did you have of getting the contract at \$1.70 when the Reliance Construction Company's bid was \$1.35?

A. I did not know what action Hood River would take about the bids.

Q. You knew the city had to award the contract to the lowest bidder.

A. I did not know if they would be able to get the bond to save the city harmless.

REDIRECT EXAMINATION.

Questions by MR. C. H. CAREY:

Q. There has been prepared and submitted here what purports to be statements in the alternative form of estimated damages. The first statement purports to show estimated damages at \$8,329.95, based upon the offer of the license privileges, which is on file at Hood River; the second purports to show the complainants' damages, estimated on the basis of complainants' average profits for work of a similar character during the year 1913, a total of \$8,190.51, and the third alternative statement purports to show complainants' damages, estimated upon the profits complainant would have made if the contract had been awarded to it by the City of Hood River, amounting to \$12,132.75. In statement No. 2, which shows the average profits of your company for work of a similar character during the year 1913, a total number of 18,108.59 square yards is multiplied by the decimal .4523. I will ask you how the average price of .4523 is arrived at and whether it is shown in this tabulated statement already offered in evidence?

A. It is the result of the 126,000 square yards of Hassam pavement laid in Portland in 1913, the amount of material that entered into it, the labor and the royalty we paid and the bond and the water we used in our paving, we had to pay the city for, and that left a margin of .4523.

Q. The details of that is shown in these statements, Exhibits 3, 4 and 5?

A. Yes.

Q. I likewise call your attention to the items set out in statement No. 3, the average cost of the work per square yard, based on complainant's experience during the year 1913 in doing similar work, and to the figures 1.1259, and I will ask you how those figures are obtained?

A. That represents the cost of the paving we laid in 1913.

Q. The average cost?

A. The average cost, yes, of all our work during that season.

Q. The price of the material and labor, as stated there, is that a correct statement of the cost of those items?

A. Yes.

Counsel for complainant offers in evidence the statements shown witness. Objected to as incompetent, irrelevant and immaterial. The same is admitted, subject to the objection, and filed marked Complainants' Exhibit 6.

RECROSS EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. Mr. Crane, when were these tabulated statements made?

A. At the end of each season's work.

Q. That tabulated work was all done in Portland, was it not?

A. Yes.

Q. Then you have no tabulated statement of what it would have cost you to do work in places similar to Hood River?

A. These statements would answer the purpose just as well. It is a question of the difference in the cost of the material.

Q. You figure that the cost of labor and material and the expenses of the job would be the same in Hood River as it would be in Portland?

A. I think the labor would be about the same; I figured the material would be a little higher, I made an allowance for that.

Q. Have you figured what it would cost your company in actual money to lay this job in Hood River?

A. I think I did at that time.

Q. That is not given in evidence?

A. No.

Q. Would you say you could lay the work substantially as cheap in Hood River as you could in Portland?

A. I would put it seven or eight cents more in Hood River than in Portland.

Witness excused.

Thereupon the taking of testimony herein is ad-

journed until tomorrow morning, May 16, at 9:30 A. M.

.....

Master in Chancery.

District of Oregon—ss.

On this 16th day of May, at the hour of 9:30 A. M., appear the parties herein as before, the complainant appearing by Mr. C. H. Carey, and the defendant, the Reliance Construction Company, by Mr. R. R. Duniway, and thereupon the following proceedings are had:

B. ASSMANN is called as a witness for the complainant and, being first duly sworn, testified as follows:

DIRECT EXAMINATION:

Questions by MR. C. H. CAREY:

Q. You reside in Portland?

A. Yes, sir.

Q. What is your business?

A. Bookkeeper and secretary of the Oregon Hassam Paving Company.

Q. How long have you occupied that position?

A. As bookkeeper ever since the organization of the company in 1908.

Q. Have you charge and custody of the books of account of that corporation?

A. Yes.

Q. Have you brought those books here?

A. Yes.

Q. Are they before the master now?

A. Yes.

Q. Did you prepare the tabulated statements, Exhibits 3, 4 and 5, which have been introduced in evidence here, purporting to be a recapitulation in detail of the business of that company?

A. Yes, sir.

Q. Showing the cost and profits of its business for the years 1911, 1912 and 1913?

A. Yes, sir.

Q. When did you prepare them?

A. About January of each year.

Q. Then you prepared it when?

A. For 1911 about January, 1912. Sometime in January.

Q. And the one for 1912?

A. About January, 1913, and the other in January, 1914.

Q. How were they made up?

A. The data was taken from the statements that I made up after we finished each contract. These statements were taken direct from the books, that is the items in the statements.

Q. Do your books show a complete account with each contract job that your company took?

A. Yes, with each one separate.

Q. What is this statement as it is first drawn off from the books?

A. It is something like this here (pointing to statement).

Q. Then you first prepare a statement of the contract?

A. As the work is completed.

Q. And from what is that statement made up?

A. From the account.

Q. The book entries?

A. Yes, sir.

Q. Then these general statements, Exhibits 3, 4 and 5, are summaries from of what is contained in these preliminary statements drawn off for each contract?

A. Yes.

Q. State whether or not these statements, Exhibits 3, 4 and 5, are correct or otherwise?

A. They are correct.

Counsel for complainant states that complainant offers in evidence, as far as necessary for the purpose, the book entries and the statements, contracts and vouchers produced by the witness and I offer them for examination by the master and opposing counsel. No objection. The documents referred to are considered as filed in evidence.

Counsel for complainant, in order to make the record complete, now again offers in evidence Exhibits 3, 4 and 5, and counsel for defendants again renew the objection to the offer as heretofore made when the said exhibits were heretofore offered. Same ruling. The exhibits are received in evidence, subject to the objection of defendants' counsel.

Q. Now, Mr. Assmann, will you state whether or not your book entries were examined and checked over from year to year by a certified accountant?

A. Yes, after 1910 and then every year thereafter, except this year. There was not much work.

Q. Were Exhibits 3, 4 and 5 examined by this accountant?

A. No, he examined the books.

Q. Just the book entries?

A. Yes.

CROSS EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. Mr. Assmann, the profits shown in these Exhibits 3, 4 and 5 are the same profits which are shown by the books and the company's declaring dividends?

A. Only the paving part of it.

Q. What do you mean by paving part of it?

A. They do not show concrete or sidewalk work or anything like that, just the paving.

Q. Then these are not complete statements of the company's business?

A. Well, these do not show the cost and profits of other work.

Q. What do you mean by "these"?

A. These are more complete than what we have got on the sheet. •

MR. CAREY: When you refer to the word "these" you mean the contract statements?

THE WITNESS: These contracts they show the aggregate profits. That is these statements of contracts.

Q. What is the difference between your gross profits and your net profits?

A. Well, there would be considerable overhead expense and office rent and so on.

Q. In these tabulated statements 3, 4 and 5, what have you left out?

A. I have left out all work that does not pertain to paving.

Q. Describe what you mean by that?

A. Excavation and sidewalk. If there is any water pipe or sewer or anything like that in the contract, that is all done before the paving is laid.

Q. And you left out all overhead charges, have you, in these statements 3, 4 and 5?

A. Yes, sir.

Q. How about expense of getting work, that is left out, too, is it not?

A. Yes, sir.

Q. And promotion expense?

A. No, that is in commissions, bond, etc. That is included.

Q. Bond and commisison is in 3, 4 and 5?

A. Yes.

Q. You are sure that is in there?

A. Yes.

Q. What is included in overhead?

A. Such things as office rent and salaries.

Q. Office rent and what else?

A. Salaries of the force in the office.

Q. Anything else included in your overhead?

A. Why, there might be some interest, I guess.

Q. What is included under the head of bonds and commissions?

A. When there is a surety bond for a contract and the commissions.

Q. Any other expense incurred by the company that is not in there?

A. There might be some repairs to machinery.

Q. Now, have not you got a general expense account, or some general account in which you put miscellaneous expenses?

A. Yes.

Q. That is not put into Exhibits 3, 4 and 5?

A. No.

Q. What kind of items would go into this general expense account?

A. Office rent, telephone and telegraphing and legal expense.

Q. What else?

A. I do not think of anything else. Some items are thrown into miscellaneous that do not belong to either of them.

Q. What do you throw into miscellaneous?

A. Well, anything that is not office rent or telephone. There might be some other items I cannot name.

Q. Miscellaneous is not put into these tabulated statements 3, 4 and 5?

A. No, and general expense is not in there.

Q. Now, these tabulated statements 3, 4 and 5 is work done here in the City of Portland only, is it not?

A. Yes. That is all we did, except one at River-side, that would be out of Portland.

Q. Statements 3, 4 and 5 are made up of work done here in Portland?

A. Yes, except one contract.

Q. Now, how much have you charged up for interest and discount?

A. That is not included in the statement.

Q. That is not included in three, four and five?

A. No.

Q. How about maintenance, is that included?

A. No, that is not included.

Q. How about depreciation of machinery, is that included in 3, 4 and 5?

A. No, sir.

Q. How about taxes?

A. Not included.

Q. How about corporation fees, is that included in 3, 4 and 5?

A. What fees?

Q. Corporation fees.

A. No, that is charged in taxes.

Q. Now, to get this clear, Mr. Assmann, I want

you to give again the difference between gross profits and net profits.

A. Well, gross profits is the difference between the cost of labor and material and such things as properly go with the contract, and what we get out of it.

Q. And what do you mean by net profits?

A. Well, net profits, we do not figure up the net profits on each contract, but at the end of the year you deduct taxes, expenses, etc.

Q. Net profits is what the stockholders make by owning stock in the company?

A. Yes.

Q. And gross profits is what they would make if they were one person working in this paving business, is that not the difference?

A. I guess so.

Q. Now you have excluded from these statements, Exhibits 3, 4 and 5, as I understand you, everything except the mere laying of the Hassam itself, is that right?

A. Yes.

Q. These different items that you have enumerated as being omitted, have you got the data so you can tell us how much they amount to in dollars and cents?

A. For the whole year?

Q. Yes.

A. It is all in the books.

Q. Well, can you tell us how that would change the results of your statements 3, 4 and 5 if these omitted items were included?

A. It would not change the statements.

Q. How?

A. What do you mean?

Q. These tabulated statements, Exhibits 3, 4 and 5, purport to show a certain result; how would that result be affected if the items which you have omitted were placed upon those statements or included in those statements?

A. Of course, they would make the profits less.

Q. How much less?

A. I cannot remember how much per yard it would be.

Q. Can you tell us the difference between the gross and the net profit during the year 1913?

A. I cannot remember that, it is in the books.

Q. Can you for the years 1911 and 1912?

A. No, I cannot remember.

Q. Do your books here show every item of expense to the company of every nature?

A. Yes.

Q. Is there nothing that has been paid out by the company that is not shown on the books of the company?

A. No.

REDIRECT EXAMINATION:

Questions by MR. CAREY:

Q. Is it your practice when a contract is completed to make up a statement of that contract?

A. Yes, after every contract.

Q. In making up that statement do you set down the aggregate items, the total work done and the details showing how much you get for it?

A. Yes, sir.

Q. And then, as against that, you set down the cost of the work done?

A. Yes, sir.

Q. And do you set down the number of barrels of cement used, and the rock, and sand, and labor?

A. Yes, sir.

Q. And how do you get the items that go to make up the cost of the Hassam pavement?

A. It all comes from the report of the foreman.

Q. Daily reports?

A. Yes.

Q. And that is shown in the statement of the contract?

A. Yes, sir.

Q. Then do you proceed to deduce the cost per square yard from the cement, rock, sand, labor, teams, bond, royalties, etc.?

A. Yes, sir.

Q. In that way you estimate the cost per square yard?

A. Yes, sir.

Q. And the cost per yard?

A. Yes.

Q. And the profit per yard on the Hassam pavement?

A. Yes, sir.

Q. Now, the items relating to the Hassam pavement are those transferred by you at the close of the year into a statement such as Exhibits 3, 4 and 5?

A. Yes, sir.

Q. In those statements, 3, 4 and 5, you have a column headed "Miscellaneous," what does that include among the expense items?

A. Miscellaneous labor; for instance, if they are spreading rock there are many men spreading rock, but the foreman or timekeeper that watches over them, that is not included. Such things go into the miscellaneous labor.

Witness excused.

Thereupon the taking of testimony herein was adjourned until June 20, 1916, at 10:00 o'clock A. M. District of Oregon,—ss.

On this 20th day of June, pursuant to adjournment, the parties appeared before the master in chancery, the complainants by Mr. C. H. Carey, their solicitor, and the defendants by Mr. R. R. Duniway, its solicitor, and thereupon the following proceedings were had, to wit:

Counsel for complainant now presents and files written objections to defendant's account as heretofore furnished.

JOSEPH D. GILLINGHAM is called as a witness for the complainant and, being first duly sworn, testified as follows:

DIRECT EXAMINATION:

Questions by MR. C. H. CAREY:

Q. Mr. Gillingham, you are an accountant by profession?

A. A certified public accountant of the State of Oregon.

Counsel for defendant admits the qualification of the witness.

Q. Have you examined the account of the Reliance Construction Company of profit as furnished to the master in chancery here?

A. I have.

Q. I will ask you to state whether or not in connection with that account you examined the books of the Reliance Construction Company and the vouchers relating to that account?

A. Yes, I examined them.

Q. State whether or not these account books were ever closed and balanced.

A. No, sir; never closed at any period until the present time; they are not closed yet; they never have been closed at any time.

Q. There appears to be an account furnished by

the defendant and from the testimony of Mr. Straicher, the bookkeeper of the Reliance Construction Company a debit item in the account of profits under date of January 19, 1915, which was put in the account books since the hearing before the master of chancery in this proceeding,—will you please look at that item. I call your attention to the debit charge there of expense \$604.82 under that date,—will you please state whether or not the annual expense of the Reliance Construction Company was distributed and proper entries made from time to time in the account book.

A. It was not. That was simply an appropriation of the entire expense from a time dating before the company was incorporated.

Q. How was that amount, \$604.82, arrived at by the bookkeeper who made the entry?

A. There was a basis used by taking \$26,618.48, the amount received from warrants on the Hood River work, and the grand total of warrants that they received of \$289,683.88.

Q. You say the denominator of that fraction represents the total amount of all their work,—do you mean the total amount of their work for that entire time?

A. Yes, the grand total. They used that as a denominator and they divided the total expense for the entire period by that and charged up the paving work with its proportion, which amounted to 9.2 or approximately 10 per cent of the entire charge.

Q. How long had those expense items accumulated?

A. From the period from June 18, 1912, the time they started their first contract and they completed their last work on June 16, 1914,—I say, they completed it because that appears to be the date they received their last warrants.

Q. Then, as I understand, the method of arriving at the proportion of expense which is charged up in this entry against this particular contract is to take the gross amount of warrants received by that company for all of its operations in all of its contracts during the entire period and using that as a denominator of the fraction and the numerator of the fraction is the net amount of warrants received upon this Hood River paving job?

A. Yes, relating to this particular item of expense.

Q. I am talking about expense.

A. Yes.

Q. Would it now be possible to make an annual closing of the books of the company?

A. At the present time it could be done, but it would be quite a little work.

Q. Is it practicable now to ascertain what part of the expense should properly be apportioned and applied to this particular job and, if so, how would that be done?

A. My method would be to eliminate entirely the total expense that was incurred up to the time they

started the paving—that was about April 26, 1913, at which time their books showed that the expense amounted to \$3,572.09; that would leave a balance to be distributed over the period in which the paving is a part from their grand total. In this grand total of \$6,579.39, which has been used to arrive at the amount charged to paving work of \$604.82. Included in the \$6,579.39 there was some items which are properly chargeable to the Boise and Weiser work, which should be deducted from this grand total and not distributed over all the work. When that amount is deducted, we have a net amount for distribution of \$5,271.45. From that \$5,271.45, as I just stated, \$3,572.09 was for the period prior to the paving work, and on the assumption that the books were closed at that time that would be charged to that work and they would start in afresh.

Q. Then you would eliminate all the expense incurred prior to the time this work was instituted?

A. Yes, because it has no bearing on it.

Q. Then the whole amount of expense during the entire period you give as \$6,579.39 and you would eliminate how much of that?

A. I reduce it about \$1,300.00. I reduce it to \$5,271.45. The reason for reducing that is there was an item of \$978.22, which is shown as Weiser ledger, from which I infer that they had a separate ledger for the Weiser contract and charged up this account, making a new amount of distribution from the time that the paving work was started until they

closed all their operations, of \$5,271.45. Then I divide that into the period of days, because the method that they have used is erroneous. The work was of a diversified character; there was all manner of work done, not any special line of work, and this expense really is in the production of that work and as such should be distributed in the progress of the work. I deduct the \$3,572.09 from the grand total of \$5,271.45, which gives me \$1,699.36 to be distributed over the period from the time the paving work started until they ceased their operations.

Q. That \$1,699.36 represents the expense during the period of this contract, if I understand you, of all work?

A. No, all work from the starting of this paving until they discontinued business. Dividing the \$1,699.36 by the time from the starting of the paving until the finishing of all work, 417 days, that gives me a daily overhead of \$4.075.

Q. That is the daily expense?

A. The daily expense for that entire period of 417 days. The paving work was started on April 26, 1913, and completed September 20, 1913, a period of 147 days. 147 days at \$4.07 $\frac{1}{2}$ gives the amount of \$599.03, which is the overhead during the time the paving work was in progress. Now we lose our basis here of distribution because we have not got the labor of all of their work, so I adopt their method of the gross warrants and the warrants on this particular job, which, as I said

before, gives us a percentage of 9.2 of this \$599.03 and we have got \$55.11 as the amount which should be charged up to this job, and if any overhead expense should be charged in this account, it should be \$55.11, as I compute it, instead of \$604.82.

Q. Will you state now whether any overhead should be charged in this particular account?

A. I do not believe it should.

Q. Why?

A. Because overhead is taking the gross period.

Q. The business as a whole?

A. Yes.

Q. Even allowing the amount of expense actually apportioned to this job of \$55.11 there is an overcharge in this account of \$549.71 on this item alone, is there not?

A. Yes.

Q. Now please look at the maintenance item in the same debit item of January 19, 1915, "Maintenance \$258.19." I will ask you whether or not from your examination of the books you have ascertained that to be an improper charge and, if so, in what amount?

A. Their distribution on that is that they practically charge one-quarter of the entire amount to the paving work. Their books appear to reflect a sale to the Consolidated Contract Company of some of their equipment to the amount of \$6,000.00, which afterwards they made an allowance for of \$250.00,

and \$250.00 is charged up to this Maintenance Account.

Q. Now, do any of those operations with the Consolidated Contract Company have anything to do with this particular paving that was laid at Hood River?

A. They rented equipment from them for something like \$300.00.

Q. They paid rental?

A. Rental for the equipment.

Q. Well, how did they come to charge \$258.19 for maintenance on the same?

A. They took and distributed their grand total maintenance over the entire period in the same manner that they did in the case of expense, and my opinion is that there should not be any maintenance charged because of the fact that \$250.00 of it was for the allowance on the sale of that machinery long before the paving work was done, and in addition to that there is \$679.59 which accrued prior to the time the paving work was undertaken, and \$63.80 further for repairs on a Buckeye ditcher and eliminating all these items you have about \$35.82 for distribution.

Q. The ditcher was not used on this paving work?

A. No, as I understand it the ditcher is not a paving machine.

Q. Go ahead.

A. In the maintenance distribution instead of

using their factor that was used on expense they eliminated from their calculations the amount received from Weiser and they made their factor 26,618.48-105,795.67.

Q. Then, as I understand you, your judgment is that the entire charge of \$258.19 should be eliminated and has no application to this job in any way?

A. Yes, it should be eliminated.

Q. Now look at the next item, did they rent all equipment with which that work was done?

A. I understand they rented a team from some boy in Hood River, and they rented a roller outfit from the Consolidated Contract Company, and they rented some of their equipment from Giebisch & Joplin.

Q. I call your attention to the next item, \$199.64, in the same debit charge, January 19, 1915, and ask you to analyze this and show whether that amount was any part of and should properly be in this debit item or this account?

A. Following the same procedure and using the same factor for interest as I have stated for expense, it would bring the interest charge to paving of \$30.04 rather than \$199.64.

Q. That would be an overcharge of \$169.60?

A. Yes.

Q. I will ask you whether interest is a proper item, in your judgment as an accountant, to be

taken into consideration in making up an account of profits on this particular paving job?

A. No, sir; and as such should be eliminated.

Q. So that the entire amount of \$199.64 should be eliminated from this account?

A. Absolutely, in determining the amount as gross profits.

Q. Now on the credit side of this account there appears to be one-half of one per cent discount on warrants, can you explain that?

A. Well, that was the price they paid to get the money on the warrants; it is really in the same light as interest; they had to pay that amount in order to realize on the warrants and it does not enter into the account.

Q. You understand that the company receives certain city warrants?

A. They received warrants for this work which they discounted at one-half of one per cent.

Q. How much in the aggregate did this discount amount to in money?

A. \$133.79.

Q. In your judgment as an accountant should this be allowed in estimating the amount of profits on this particular contract?

A. No.

Q. I will ask you whether in this account appear to be expenditures for tools and materials used on the job?

A. Yes, the nature of the work required that they buy a lot of miscellaneous tools, such as hoes, rakes, shovels, picks, etc.

Q. Do they in this account charge the entire cost of those tools to the job?

A. They do.

Q. Do they allow anything for salvage on the value of the tools in the account?

A. Nothing.

Q. Will you give us the items of those tools which were purchased and charged to this account.

A. There were hose and couplings purchased on two occasions, the first being \$56.10 and the next \$55.10, then a saw and hammer, an axe, a couple of shovels, picks, and handles \$41.55, rakes and steel tamper, bush brooms \$18.45, canvas covers \$39.90, more brooms \$5.50, amount to \$216.60.

Q. How much, in your judgment, is the salvage value, on a contract of the duration that this work would be, on items of this kind—what percentage should be allowed.

A. Twenty-five per cent.

Q. What would be twenty-five per cent?

A. \$54.15.

Q. You think that \$54.15 should be accounted for as the value of these supplies on hand at the close of the work?

A. Yes.

Q. That amount should be added to the credit items of the contract?

A. Yes.

Q. Under date of June 23, 1913, appears a debit item, Frank E. Smith & Co., \$233.10; what part of that, if any, was the cost of a bond indemnifying the city from damages on account of infringement of the patent involved in this suit?

A. \$95.00.

Q. Under date of September 13, 1913, there appears a debit item, John Hall, \$125.00, attorney fee; what was that intended for?

A. That is given as John Hall. It is for attorney fee. There is no invoice furnished with it and I questioned Mr. Straicher as to what it was for and he said it was legal advice.

Q. Under date of July 17, 1914, there is an item, Frank E. Smith & Co., \$50.00; what was that for?

A. There is no bill showing what it was for.

Q. Did you ask what it was?

A. I asked and they thought it was really for the \$95.00 item.

Q. A renewal of the indemnity bond given on the patent?

A. Yes.

Q. Now sundry items appear in this debit account for labor; did you examine the pay rolls and time checks?

A. I did.

Q. State whether the pay rolls were signed and verified by any officer, superintendent or foreman,

or other person, to indicate whether this labor was performed on this particular job or some other?

A. They are not signed by anybody.

Q. You may state whether or not this company was carrying on other work at the same time at Hood River?

A. They had other contracts at Hood River.

Q. Is there any possible way to verify the truth of these debit items as to labor in this account as furnished by the defendant.

A. No, none at this time.

Q. You have, however, in your examination, accepted them as correct?

A. I have accepted them as going into that contract because they were noted.

Q. What evidence did you have, if any, that that was the fact?

A. None, except the fact that they were entered in the books, and the notation on the payroll says "Paving."

Q. Now, what was the practice of the company as to other jobs as to whether the pay rolls were signed by the superintendent or officer having charge of the work?

A. I cannot say, I only had the pay rolls relative to this particular account. They only offered me the pay rolls which report these charges and these were marked "Paving."

Q. Will you please now read the items in the debit account for which no invoice was furnished?

A. April 20, 1913, Charles E. Steelsmith, agent, \$24.00; May 1, 1913, cash to set car, 50 cents; May 10, 1913, Henry Foot, \$5.00; June 2, 1913, F. H. Tate, \$1.25, not on payroll; July 15, 1913, A. W. Curry, \$8.70; July 29, 1913, F. Rowley, \$69.20; July 30, 1913, Giebisch & Joplin, \$37.06; July 13, 1913, same name, \$4.35; July 30, 1913, Giebisch & Joplin, \$98.00; Aug. 6, 1913, D. McDonald, \$2.55; Sept. 13, 1913, unloading cars at Hood River, \$15.65; Jan. 1, 1914, H. Mortenson, 90 cents; Feb. 26, 1914, Hood River County, \$54.10. That is all of them.

Q. What is the aggregate of those?

A. They total \$321.26.

Q. Referring again to the expense item concerning which you have testified, what kind of expense do they cover?

A. The grand total?

Q. No, what kind of expense—what kind of items?

A. Trips back and forth to the job, officers' salaries, freight, \$50.00 for a trip to Boise, book-keeper's salary.

Q. And office rent?

A. Yes, sir; all those miscellaneous items.

Q. Any expense relating to this particular job?

A. No.

CROSS EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. In giving your testimony, you have been re-

ferring to a paper or tabulated document, what is that?

A. This is a detail that I made up of the account.

Q. You used that to refresh your memory in your testimony?

A. Yes, to refresh my memory; there are so many figures that I could not give them without reference to it.

Q. Giving your testimony, your testimony is given simply as an accountant of the way you figure the books and vouchers that have been submitted to you?

A. Yes, as an accountant.

Q. You have no personal knowledge of the matter except such as you derive from the accounts, vouchers, etc.?

A. What do you mean by personal knowledge?

Q. Knowledge that you have derived from observation?

A. I am giving that.

MR. McCAMANT: You were not there at the time the work was done?

WITNESS: No.

MR. McCAMANT: All the knowledge you have is from examining the record?

WITNESS: Yes.

Q. You have been testifying as an accountant of what the books indicate?

A. Yes.

Witness excused.

JOHN H. CRANE is recalled as a witness for the complainant and, heretofore been duly sworn, testified as follows:

DIRECT EXAMINATION:

Questions by MR. C. H. CAREY:

Q. How extensively in the State of Oregon has Hassam pavement been used?

A. I will say between nine hundred thousand and a million square yards.

Q. Has your company had any infringement brought to your attention other than that involved in this suit against the Reliance Construction Company?

A. This and the Consolidated Contract Company.

Q. What effect, if any, has the infringement by the defendant the Reliance Construction Company and that by the Consolidated Contract Company had upon the business of your company in laying Hassam paving in Oregon?

A. We lost the contract in Hood River and several contracts in Portland by these parties laying our pavement without our permission.

Q. Prior to the time your company engaged in business in Oregon had this article of manufacture, —Hassam pavement, been in use in this state?

A. No, we introduced it here.

Q. What promotion work was done by your company to get it introduced?

A. They interviewed the property owners whose property was to be assessed for the proposed improvement and in consideration of their accepting Hassam pavement gave them some very low prices for laying the pavement, had several meetings with the city engineer, explaining the process of laying the same, and gave references to other cities where it had been used, and work of that character.

Q. Will you state whether or not your pavement was laid in competition with other meritorious pavements of somewhat similar character?

A. Yes, it was.

Q. What is the fact as to whether or not your company have had any competition here with other paving companies throughout the entire period?

A. We have had very severe competition since the organization of our company in this city.

Q. Again I will ask you what effect, generally speaking, has these infringements had upon the ability of your company to get contracts in the state, and as to whether or not it has been claimed that your patent was invalid, and as to whether or not your chances of getting contracts for your pavement has been diminished?

Counsel for defendant objects to the question as incompetent, irrelevant and immaterial and because it does not tend to support any issue in this case. Testimony admitted subject to the objection.

A. There have been several meetings of property owners that took place in the city and many times they brought out the fact that other concerns have laid our pavement and that we have not collected any royalty from them for doing so and they had in mind that our patent was more or less of a bluff and that we were imposing on the property owners of the city in claiming that we had a valid patent. Such things as that make it very hard to sell an article.

CROSS EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. Mr. Crane, what is the object of your being recalled and testifying to this kind of testimony?

A. I cannot tell you.

Q. You are manager of the Oregon Hassam Paving Company, are you not?

A. Yes, sir.

Q. You know the object of this proceeding, do you not?

A. Yes, sir.

Q. Cannot you explain why you give testimony of this kind in addition to your former testimony in this case?

A. No.

Q. You cannot?

A. No.

Q. You have had no consultation with your at-

torney as to why it was advisable to introduce this testimony?

A. No.

Q. Now you recall, do you not, the stipulation that was entered into with reference to the proceeding before the master?

A. No.

Q. You do not recall that?

A. No.

Q. In what cities in the State of Oregon has Hassam been laid?

A. The City of Portland and Hood River.

Q. That is all, is it not?

A. That is all to my knowledge.

Q. You know all that has been laid in the State of Oregon, do you not?

A. I think so.

Q. The only infringements you claim as that of the Reliance Construction Company and the Consolidated Contract Company?

A. Those are the only infringements.

Q. And as to the effect of the infringements, the Hassam Company has laid all the Hassam laid in Portland and in Hood River except that one job in Hood River laid by the Reliance Construction Company and those jobs in Portland laid by the Consolidated Contract Company—that is all, is it not?

A. Yes.

Q. Your company laid none in Hood River at all?

A. No.

Q. Now you were asked if Hassam had been laid in the State of Oregon prior to the time your company was organized?

A. Yes.

Q. You know that it is a fact that concrete pavement was laid in the State of Oregon before your company came here?

A. That I do not know.

Q. Now is it not a fact that this concrete paving that you term Hassam was only laid in Portland by reason of the promotion work done by the Hassam Company in working up contracts?

A. I would say it was the merits of the paving.

Q. It was the promotion work?

A. That introduced it, I presume.

Q. Why were the very low prices given to the property owners to induce them to accept of the merits of the paving?

A. So they would examine into the merits of the paving.

Q. You took that method of promotion to get them to see through the merits?

A. To get them to analyze the paving and look into the matter.

Q. Is it not a fact that the Hassam Paving Company laid considerable paving at almost nothing to get the property owner to favor it?

A. It is not, only in one case.

Q. Now you say you laid it in competition with other paving, is it not a fact and do you not know it to be a fact that there was no competition between the paving companies in Portland, that they operated under a gentleman's agreement during the time that Hassam was laid here?

A. It is not a fact.

Q. Do not you know it to be a fact that they had spheres in which one class of pavement would be laid and in your sphere there would be no paving laid except that in which the Hassam Company was interested?

A. No.

Q. The Hassam Company so conducted its promotion campaign in Portland, did it not, so that there could be no competition with it, if the city would award the contract for Hassam paving?

A. I do not understand it that way.

Q. You know what procedure the Hassam people used in the laying of Hassam pavement in Portland, do you not?

A. Since I have been here I do.

Q. Don't you know what was done prior to that?

A. No.

Q. Don't you know that under the procedure used by the Hassam Company that the contracts were illegal and the assessments were not legally collectible for the laying of Hassam pavement on

account of the illegal procedure used by the Hassam Company in getting contracts from the City of Portland?

A. I know we collected every dollar due us.

Q. Do you not know that in every case where the assessments were disputed they were declared illegal and void?

A. No, I do not.

Q. You are not very well posted on the legal end of your business, are you?

A. No, I am not an attorney.

Q. Can you specify any contracts which were not awarded the Reliance Construction Company or the Consolidated Contract Company which were prevented from being laid by the Hassam Company by anything that anybody did?

A. No.

Q. Then it is a fact, is it not, that all the Hassam that any city in the State of Oregon could be induced to lay, has been laid?

A. As far as I know.

Q. Then the only complaint of infringement that the Hassam people have is against the Reliance Construction Company and against the Consolidated Contract Company?

A. Yes. I might add that during the time the Consolidated Contract Company was bidding on our work that I stopped all promotion work. It was customary for us to circulate petitions for

Hassam paving, but I came to the conclusion if they insisted on taking all the Hassam contracts that were advertised for bid that it was a waste of money on our part to try to promote Hassam so I stopped that work.

Q. Well, that result came from stopping the promotion work?

A. I stopped the promotion work because I was not sure of procuring the work.

Q. Did not you stop promotion work because you had every reason to believe that your patent was invalid?

A. No, indeed.

Q. Well, if you had faith in your patent and faith in your suits for infringements, where would be your loss in going ahead in your promotion work and collecting from the infringers?

A. It cost considerable to keep men out circulating petitions and that cost would come upon the Oregon Hassam Paving Company and if there is litigation, there is nothing in our contract with the home company that we would be reimbursed for that expense.

Q. Well, you make that answer in view of the fact that the 15% royalty to the home company was the utmost that they would be entitled to recover in an infringement suit?

A. Well, I do not know anything about that.

Q. Well, if you have the right to recover fifty cents license fee, what difference did that make?

A. I did not go into that at the time.

Q. In figuring up the expenses of your business you figured on promotion expense, did you not?

A. It used to be done before I came here, but I did not term it that.

Q. You did not take promotion expense as part of the business?

A. Yes, I did.

Q. But you eliminated that when you came to figure profits did you?

A. No.

Q. What did you do with it?

A. Put that in our overhead.

Q. You figured that in your overhead?

A. Yes.

Q. Then your promotion does figure in your items of expense?

A. It does.

Q. How much promotion expense did you give, or how much of a discount to property owners did you give on the East Clay Street in this city?

Counsel for complainant objects to the question as incompetent, irrelevant and immaterial.

A. (Taken subject to objection.) We did not promote that street. The property owners themselves circulated the petition. We did not send a man there to do any promotion work or give any rebate.

Q. And what price did you lay that street for?

A. I do not remember, I think possibly \$1.40.

Q. What year?

A. 1915, I think.

Q. You spoke about laying this pavement in competition with other pavements,—what kind of pavements were in competition with you?

A. Asphalt and bitulithic.

Q. What do you mean by competition with them?

A. Competitive bidding.

Q. How was it competitive?

A. We submitted bids according to the request of the city for laying pavement on certain streets.

Q. The city called for separate bids on each different kind of pavement?

A. They did.

Q. And it was left to the discretion of the authorities of the City of Portland as to what kind of pavement they would lay regardless of the price?

A. They can exercise their authority on demand of the property owners and select the character of improvement.

Q. And you are sure there is no gentlemen's understanding between these different people?

A. Not with Hassam,—there is not with Hassam.

Q. What range of price has the Hassam Company submitted for Hassam pavement in the City of Portland?

A. I should say if I remember right from \$1.20 to probably \$2.00 per yard.

Counsel for complainant here states that with the exception of the right to introduce the deposition of Mr. E. O. Hall of Pittsburgh, Pa., when the same shall be received, the complainant rests.

Witness excused.

E. O. BLANCHAR is called as a witness for the defendants, and being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by MR. R. R. DUNIWAY:

Q. Please state your name, age and occupation.

A. E. O. Blanchar, age 45, occupation First National Bank, Hood River, Ore.

Q. Were you mayor of Hood River at the time the Hassam pavement was under construction there?

A. Yes, sir.

Q. Are you acquainted with Mr. Crane, the manager of the Hassam Paving Company?

A. I think I have seen Mr. Crane, I am not intimately acquainted with him.

Q. Now, Mr. Blanchar, will you please explain in your own way how this paving matter came up in Hood River, and what the City of Hood River did to get bids for paving and what the City of Hood River was willing to do in regard to paving?

A. The city had been considering paving for several years. And it finally came to the point of actually building it in the spring of 1913, or the

winter of 1912 and 1913 to be more accurate, and a Street committee of the City Council of Hood River were delegated to investigate paving upon the recommendation of the mayor, and it was further recommended that they obtain the services of a competent engineer to consult with them as to what would be the most suitable pavement for Hood River streets considering its climatic condition, grades, and its ability to pay for the pavement. The street committee did as they were authorized to do, and if my recollection is correct,—it is several years ago,—they recommended the Hassam type of pavement.

Counsel for complainant objects to this testimony on the ground that the record is the best evidence.

Q. What next was done?

A. The cost of the pavement was a vital issue with the city,—as far as the mayor was concerned, at least, and our hesitation as to putting in many desirable pavements was entirely on account of the cost. We wanted a good pavement and we really felt like putting in brick, but it was beyond our means to build it, or even wood block, and we seriously considered whether it would be better to put in Hassam or concrete,—what is termed concrete, I believe Portland cement. Well, our engineer seemed in favor of the Hassam type for wearing surface, so the bids were called for for the two types of pavement.

Q. What two types?

Counsel for complainant objects to the question on the ground that it is incompetent and not the best evidence. That the record is the best evidence of what was done. Objection sustained.

Q. I wish you would state what was the greatest price at which the City of Hood River would have taken Hassam pavement over concrete pavement advertised for.

Counsel for complainant renews the objection and also objects on the ground that the question calls for the opinion of the witness. Answer taken subject to the objection.

A. The various ideas of the council are very hard for me to remember at this time, but I do remember that it was our intention to secure a pavement for somewhere close to \$1.25 a yard, thinking that was a price that we could stand. We hoped to get a pavement, if I remember right, at about \$1.25 or \$1.30 a yard. Now we had not at that time, as I recall, any definite idea of just what Hassam pavement was, and what the cost would be. I cannot remember that, but we had the price on concrete paving from having some work done there and we thought that we could get a good paving job that would answer our purpose for about \$1.25 or \$1.30 a yard.

Q. What can you say as to the highest price which the city would have gone for Hassam pavement at that time?

Same objection. Answer taken subject to the objection.

A. My opinion is that \$1.40 would have been the limit.

Q. Mr. Crane in testifying here, Mr. Blanchar, testified that you as mayor came down to interview him and to inspect Hassam pavement and that you preferred Hassam pavement,—I wish you would state what are the facts with regard to that, and at what price you preferred Hassam pavement.

MR. CAREY: I beg your pardon, Mr. Duniway, he said some members of the council came down.

A. I do not recall that I or the committee made a special investigation, although I was down here a number of times and on one or two occasions I was with some of the members of the council.

Q. Now, with relation to the price for Hassam, will you explain as to the price at which you preferred Hassam, and what relation the price had to do with it, if anything?

A. Well, to the extent that our engineer seemed rather committed to that type of paving. Mr. Bingham, I believe. My knowledge, individually, as to the merits of the respective pavements was of course not very great and we depended somewhat on expert authority and I felt that Mr. Bingham's opinion should be considered. He seemed to favor that type of pavement. But I cannot answer that question more definitely at this time.

Q. Can you tell us anything about the top notch price at which the City of Hood River would go for Hassam over concrete that was advertised for?

A. I do not know as I could other than as I said before, that we aimed to get a pavement for about \$1.25 or \$1.30, but of course would have paid a little more if it had been a necessity.

Q. I understood Mr. Crane to testify that they put in a bid for \$1.70 and that they would have got Hassam at \$1.70 if it had not been for what they term an infringer putting in a lower bid, what do you say as to whether or not a bid of \$1.70 would have been accepted from the Hassam Paving Company, if there had not been a lower bid?

A. I do not think it would have been accepted.

Q. Now, Mr. Crane also testified that the city changed their call for bids from Hassam paving to concrete or to Hassam and concrete for the purpose of holding the Hassam Company within a reasonable price, but said that they preferred Hassam to concrete?

A. I do not remember about it.

Q. Can you recall whether there was any discussion over the subject of bids and as to what you could get Hassam for as to price?

A. I do not recall.

Q. Mr. Crane seemed to give out the idea that they had arranged with the City of Hood River to give them that contract for Hassam paving and that it was taken away from them by the Reliance

Construction Company putting in a bid at \$1.35 a yard for Hassam and \$1.30 a yard for concrete, what can you say as to whether or not the Hassam Paving Company had any arrangement with the City of Hood River so that they should be awarded the contract?

A. I do not recall that such was the case.

CROSS EXAMINATION.

Questions by MR. C. H. CAREY:

Q. You visited Portland several times prior to this paving matter coming up in the council?

A. Yes.

Q. And looked into the kinds of paving in use down here?

A. Yes.

Q. And examined some Hassam paving, did you not?

A. Yes.

Q. And formed an opinion as to its virtues and thought it was a good pavement and so expressed yourself, did you not?

A. At first some samples of the paving which I saw and which they said was Hassam rather had a tendency to have an unfavorable effect upon my opinion, afterwards I discovered that it was perhaps a little error in putting it down when weather conditions were not right and that it was not the fault of the pavement and I thought it would be satisfactory, being supplemented by the opinion of our engineer.

Q. You also informed yourself as to the price at which Hassam pavement was being laid in Portland, did you not?

A. I think so.

Q. Do you remember prior to the time bids were received by the council of Hood River that Mr. J. H. Crane, manager of the Oregon Hassam Paving Company, called on you at your bank in Hood River and introduced himself?

A. I think so, but then I would not say positively. I think that is where I saw Mr. Crane.

Q. And you had some conversation with him at that time about Hassam pavement, did you not?

A. I do not recall.

Q. Let me refresh your recollection,—did you not ask him on that occasion about the price his company would offer to lay the pavement at Hood River and he answered \$1.70 or \$1.75 around there, or words to that effect? Do you remember that conversation with him?

A. No, I do not.

Q. Well, thinking the matter over now, it is your remembrance that the price they were paying for Hassam pavement at Portland was about \$1.75 at that time, and from that on up to \$2.00?

A. I think I had that impression, if I remember correctly,—bitulithic or Hassam.

Q. Who were the members of the street committee that made the investigation?

A. Mr. Mays was one.

Q. Was Mr. Schmeltzer another member?

A. I believe he was.

Q. Do you remember Mr. Mays and Mr. Schmeltzer coming down to Portland and calling on the Oregon Hassam Paving Company people with a view of getting them to interest themselves in the laying of this pavement at Hood River in case the city invited bids?

A. I remember they came to Portland, but I do not remember what they did here.

Q. Well, on that occasion do you not know that they were told that the price would range from \$1.70 to \$1.75 per yard and did they not so report?

A. I do not remember.

Q. Now the City of Hood River was promptly notified about the patent that was claimed to cover this pavement and they were warned against infringement, were they not?

A. Yes.

Q. And the city took a bond from the Reliance Construction Company to indemnify and protect it against possible claims for damage arising out of this patent in case the Reliance Company delayed the pavement?

A. Yes.

Q. No action for damages has been begun against the city for this infringement so far as you know?

A. Not to my knowledge, no,—I never have heard of it.

Q. But the city could of course be sued for the infringement?

A. I am not informed as to that,—we took the opinion and advice of the city attorney.

RE-DIRECT EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. Do you remember that the Hassam Company also filed with the City of Hood River what is claimed to be an agreement by the Hassam Company allowing anybody to lay Hassam pavement upon paying a license fee?

A. I do not recall about that.

Q. You do not recall anything about that license agreement?

A. No, I do not.

Q. You do not recall any statement by the Hassam people as to what its purpose was or anything of that sort?

A. I have a faint recollection of something of that kind, but it is so indistinct I do not recall it.

Witness excused.

J. E. ROBERTSON, is called as a witness for the defendant, and being first duly sworn testified as follows:

DIRECT EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. Please state your business and residence.

A. I reside at Hood River. I am in the lumber business.

Q. Were you a member of the council of the City of Hood River at the time this paving question was up?

A. I was.

Q. Will you please state what you had to do with that, and what investigation you made as a member of the council and what preference you had for Hassam and at what price, or did the price enter into the question over concrete?

Counsel for complainant objects to the testimony as incompetent, irrelevant and immaterial. Testimony is received, subject to the objection.

A. I was a member of the street committee, I do not know if I came here officially or not. I was down to Portland and went to the Oregon Hassam Paving Company and made our investigation. The street committee was in favor of Hassam paving and so recommended it to the council, and while down here we found out the price that it was being laid for was \$1.70 to \$1.75 and up to \$2.00, but on second consideration, we decided that the price was too high in comparison with the size of the town and the value of the property, and we arranged the specifications to permit competitive bids for concrete pavements, and while we had a concrete bid for \$1.30 we decided to take the Hassam at \$1.35.

Q. Can you tell us how high your preference for Hassam would have gone, in money, and at what

price you would have gone,—the highest price you would have gone, for Hassam over concrete?

A. I would say for myself personally a concrete pavement of any form would not have been my personal preference, but taking into consideration the climatic conditions, I was pretty nigh in favor of the Oregon Hassam, but I would not have gone to the extent of over perhaps \$1.45 or \$1.50 at the outside against the bid for concrete, on account of the two pavements being so much alike. I am speaking for myself personally.

Q. I understand from Mr. Crane's testimony here that you would have gone up to \$1.70 if it had not been for the lower bid put in by the Reliance Construction Company for \$1.35, I wish you would state whether or not that is correct?

A. No. I would say that had we accepted a price of \$1.70 the property owners would have been very much disgruntled. That is my personal opinion.

Q. Did you gentlemen know, in investigating the price here, that the Hassam people had been making a discount to property owners to bring the price down below and very much below \$1.70, some as low as \$1.15 and \$1.20?

A. I did not know that. They told us that it was being laid in Portland from \$1.70 to \$1.75 and \$2.00.

Q. Did you gentlemen learn that Hassam was

being laid as low as \$1.15 in Portland by the Hassam Paving Company?

A. I did not.

Q. I understand from Mr. Crane's testimony that you gentlemen preferred Hassam pavement and that you first called exclusively for Hassam and that then you changed and added concrete in order to keep the Hassam Paving Company within a reasonable price?

A. It was this way. I preferred Hassam but when I learned that it was being laid in Portland for \$1.70 and \$1.75 and from that to \$2.00 that was higher than we could stand and as I remember it we changed the specifications to include concrete paving to make competition and get the price down where the property owners could pay, the two pavements being so much alike.

Q. Well, that change made, can you tell us whether or not there was any chance of the Hassam people getting the contract on their bid as high as \$1.70?

A. Speaking personally, I would have gone as high as \$1.45. I would have gone that much for Hassam.

Q. I gather from Mr. Crane's testimony that the Hassam people felt that they had arranged for Hassam pavement at Hood River at \$1.70 and that they were deprived of their job by the Reliance Construction Company putting in a bid at \$1.35, I will ask you what you considered?

A. When the bids came in it left it open for the judgment of the council between the two prices.

Q. Will you state whether or not there was any foundation for the Hassam people feeling that they could have gotten that contract from the council at \$1.70?

A. Speaking from my own personal knowledge, I would say no.

Counsel for complainants move to strike out all the testimony of this witness on the ground that it is incompetent.

THE MASTER: I will reserve judgment on that.

(Witness excused.)

A. H. STRANAHAN is called as a witness for the defendants and being first duly sworn testified as follows:

DIRECT EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. State your age and occupation?

A. Age 45, occupation livery and garage business.

Q. Were you a member of the council at Hood River when this paving matter came up?

A. Yes.

Q. Will you state whether or not the council of Hood River preferred Hassam pavement over concrete and at what price they preferred Hassam?

A. I did not prefer Hassam over concrete.

Q. You did not prefer it over concrete?

A. I did not.

Q. I understand from Mr. Crane's testimony here that the council of Hood River preferred Hassam pavement and first called exclusively for Hassam and then they changed their call to concrete or Hassam in order to keep the Oregon Hassam Paving Company within a reasonable price, what would you say about that?

A. So far as I was concerned I did not favor Hassam, I favored concrete pavement.

Q. Can you tell us whether or not there was any chance for the Hassam Paving Company having gotten this contract for this Hassam paving at the price of \$1.70?

Counsel for complainant object to this testimony as incompetent, irrelevant and immaterial. Answer taken subject to the objection.

A. So far as I was concerned it could not have.

Q. I believe that Mr. Mays and Mr. Smeltzer, both members of the council at that time, are now dead?

A. Yes.

Q. Can you give us any intimation as to how they stood on that question of price?

Objected to as incompetent and immaterial. Objection sustained.

No cross examination.

(Witness excused.)

W. H. TAFT is called as a witness for the defendants and being first duly sworn, testified as follows:

DIRECT EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. Please state your age and occupation?

A. Sixty-three years old, occupation transfer, feed, wood and coal.

Q. Were you a member of the council of Hood River when this paving matter came up?

A. I was.

Q. It has been stated here by Mr. Crane that the council of Hood River preferred Hassam paving and called exclusively for Hassam paving and then changed to concrete or Hassam, to keep the Oregon Hassam Paving Company within a reasonable price, will you please tell us what the fact is about that?

Objected to as incompetent, irrelevant and immaterial. Answer taken subject to the objection.

A. When this question first arose I was away on leave of absence but was back home when the contract was let. I was opposed to either Hassam or concrete for our city considering our grades and my views have been pretty well borne out since, but I was in the minority and consequently Hassam pavement was adopted, but as to my personal self I would just as soon have had concrete as Hassam and would not have been in favor of paying any more for one than the other.

Q. As a matter of fact you voted against Hassam?

A. I voted against Hassam.

Q. At \$1.35?

A. Even at \$1.35.

No cross examination.

(Witness excused.)

A. C. STATEN is called as a witness for the defendants and being first duly sworn testified as follows:

DIRECT EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. Will you please state your age and occupation?

A. Age 51, occupation merchant.

Q. Were you a member of the city council of Hood River at the time this paving question came up?

A. Yes.

Q. It has been stated here by Mr. Crane that the Council preferred Hassam paving and called exclusively for Hassam paving but changed to concrete or Hassam to keep the Oregon Hassam Paving Company within reasonable bounds on the price but stated that they preferred Hassam, state what the fact is with regard to that?

A. Speaking for myself, I always opposed either Hassam or concrete, but from the general trend of the members of the council it was quite

evident that concrete or Hassam would be adopted and feeling that I was representing a minority vote, I voted in favor of the contract as it was let.

Q. It is stated by Mr. Crane that the Hassam Paving Company would have had the contract at \$1.70 if it had not been that this Reliance Construction Company put in a bid at \$1.35, what would you say as to that?

Objected to as incompetent, irrelevant and immaterial. Answer taken subject to objection.

A. I am positive from the attitude of the council at that time that it would have been rejected.

Q. What is your idea was the highest price at which a contract for Hassam could have been had at Hood River at that time?

A. Well, I am positive that it could not have been obtained at a price to exceed \$1.40.

It is understood that complainant's objection applies to all this testimony.

(Witness excused.)

E. O. BLANCHAR is recalled as a witness for the defendants and having heretofore been duly sworn, testified as follows:

DIRECT EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. Will you state, Mr. Blanchar, who were the other two members of the council at that time?

A. E. S. Mays and J. M. Schmeltzer.

Q. Will you state whether or not they are now dead and if so when they died?

A. Mr. Mays died about two years ago and Mr. Schmeltzer about a year and a half ago. I would not say positively as to the exact time.

(Witness excused.)

Thereupon the taking of testimony herein is adjourned until Friday morning, June 23d, 1916, at 10 A. M.

.....

Master in Chancery.

District of Oregon,—ss.

June 23d, 1916, 10 A. M. At this time appear the parties herein before the Master in Chancery, the complainants appearing by Mr. C. H. Carey, their solicitor, and the defendant by Mr. R. R. Duniway, its solicitor, and thereupon the following proceedings are had, to wit:

R. J. STRAICHER is called as a witness for the defendants and being first duly sworn, testified as follows:

DIRECT EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. Mr. Straicher, what is your position with the Reliance Construction Company?

A. Bookkeeper.

Q. Are you also employed by Giebisch & Joplin?

A. Yes, sir.

Q. How long have you been employed by these people?

A. Almost seven years.

Q. Are you the gentleman who kept the books of the Reliance Construction Company?

A. Yes, sir.

Q. And also for Giebisch & Joplin?

A. Part of them.

Q. And you are familiar with the method of bookkeeping of the transactions of the Reliance Construction and of Giebisch & Joplin?

A. Yes, sir.

Q. Did you make up from the books of the Reliance Construction Company and from its vouchers a statement of profits on this job and which has been filed here?

A. Yes, sir.

Q. Did you go over the objections to that statement by the complainants filed in this case?

A. Yes, sir.

Q. Will you please take up the first item objected to and state if you will what is the reason that you entered that item as you did in the account of the defendant and give the court what information you can as to whether that is correct?

A. In my opinion it is a correct charge for interest, expense and maintenance.

Q. Now explain why?

A. Because the money was borrowed and in-

terest had to be paid for it and its proportion was charged to that particular job.

Q. You say its proportion was charged to that job,—will you explain what the total expense was and how you got that proportion so as to show why you charged it to this job in this manner?

A. Well, they had several jobs. I think the total in dollars and cents amounted to some \$289,000 dollars and the interest amounted to somewhere around two or three thousand dollars and I divided the total number of dollars and cents of all the contracts into the interest to get the per cent and multiplied that by the amount of this contract.

Q. Now I wish you would explain the business done by the Reliance Construction Company and say whether or not that is a fair way of ascertaining the expense for interest on this job or not?

A. Well it had to be charged some place,—a proportion had to be charged to this job. We received monthly estimates and interest was allowed on all of them.

Q. Explain what business the Reliance Construction Company was doing and how its business was run?

A. Well they had a contract up at Weiser and one at Boise on which they received monthly estimates and they also had several contracts at Hood River and some small sewers in Portland was all the business the Reliance Construction Company had.

Q. And that business on these contracts had to take care of the expense of the company, is that right?

A. Yes, sir.

Q. Now will you go on a little bit further and state how much money had to be borrowed for this Hood River job and about this item of "Interest Expense and Maintenance"—just explain more fully in detail how you got at that and what it is?

A. It is hard to go into.

Q. If you want to refer to the books you can?

A. I did not bring the journal around here, but that is the way I got it in making the charge for interest, expense and maintenance,—I took the total amount of the contracts. If they had the money on hand in the bank, the job would be charged with interest just the same.

Q. It has been suggested by Mr. Gillingham that this interest or any interest might not necessarily have been incurred on this job. Will you please explain why this amount of interest is a proper item of expense to be charged to this job as it is apportioned?

A. It is proper, if it was charged directly to interest it would be the same, the work was such that they sometimes received estimates from one job and transferred the fund to cut the interest short.

Q. The funds were transferred to keep the interest of the company to the minimum?

A. Yes, sir.

Q. So you would say that the company managed its interest charge to keep the minimum of interest on its work?

A. Yes, sir.

Q. Take this next item of expense \$604.82, how is that made?

A. What is called overhead expense, such as salaries of officers, help, traveling expense that was not charged directly to any particular job.

Q. Criticism was made by Mr. Gillingham, as I understand it, that it might be an undue amount of expense was charged to this job,—more than a reasonable expense to this job,—what can you say as to the amount of expense charged to this job being reasonable?

A. If they had just had the one job the expense would have been more.

Q. How so?

A. For the simple reason that they have to keep so many men employed and if there is only one job the expense is greater than if it is apportioned among several jobs.

Q. What would you say as to whether or not the Reliance Construction Company kept its expenses reasonable or were they extravagant?

A. I think it was very reasonable. The charge was very little considering the whole amount of expense.

Q. This expense item of \$258.19, what was that?

A. Repairs to plant.

Q. I understand Mr. Gillingham to say that the company did not have any plant at Hood River, that they hired everything?

A. They had \$15,000 worth of plant.

Q. Was any part of that plant used in any way in connection with this Hood River job?

A. There was.

Q. And how is that maintenance got at, is that proportioned to all the business?

A. Yes, sir.

Q. What would you say as to whether the maintenance charge of \$258.19 was a reasonable charge for this Hood River charge?

A. I think it is very reasonable.

Q. In keeping the books in the manner this apportionment was done was any effort made to minimize or conceal the profits made on this Hood River job?

A. Absolutely none.

Q. Were these books kept and this statement made in the regular course of business to ascertain what dividend should be made to the stockholders of the Reliance Construction Company as well as for this case?

A. Yes, sir.

Q. Were these books also experted by an accountant for the stockholders to see whether they

were satisfied with their settlement between themselves?

A. Yes, sir.

Q. Now taking up the second item in complainants' objections here,—explain why you entered as expense this discount, \$133.79.

A. They had to sell the warrants at one-half of one per cent discount and received the money and thereby keeping down the interest charge.

Q. The Hood River job was paid for in warrants of the City of Hood River?

A. Yes, sir.

Q. The only way the Reliance Construction Company had of getting money on the job was either to take the warrants and sell them or else hold them until the City of Hood River should pay them?

A. Yes, sir.

Y. What can you say as to whether or not the selling of the warrants at this discount of \$133.79 was the most economical way of getting money for the job at Hood River?

A. I think it was. If you figure it out you will see it was necessary.

Q. Take up the third item of the objection of complainant and explain whether or not there was any salvage upon these tools and state whether or not any salvage should be allowed on these items as contended for by Mr. Gillingham?

A. It should not.

Q. Why not?

A. Because the job was not charged up with all of the tools and machinery that was used and it is customary among contracting companies, when a contract is started, to charge up anything that was put in and what was left over would be used on the next job, and so on, so as to keep the thing straight.

Q. Did this job in Hood River make use of any tools left over and on hand from former jobs?

A. Yes, sir.

Q. What would you say as to whether this charge of \$216.60 was a reasonable and fair charge against this job the way they conducted their business?

A. I think it is.

Q. Was that figured in this way for the purpose of this suit at all?

A. No.

Q. As a matter of fact they used considerable other property in conducting their business?

A. Yes, sir.

Q. How did you get the fourth item objected to by complainants and state what that \$95.00 is for?

A. The bond will show what that is for, if you have a copy of the bond here.

Q. Was that for a bond?

A. I understand that \$95.00 had to be paid. It would not have made any difference whether it was

the Reliance Construction Company or the Oregon Hassam Paving Company or who it was, they would have had to give the bond.

Q. It was one of the ordinary expenses of the job?

A. Yes, I understand that was required by the contract.

Q. It was an ordinary bond given by the contractor to protect the city against a suit for the violation of the patent?

A. It was, and it would not make any difference whether the Reliance Construction Company received the contract or anyone else, the bond would have to be given.

Q. Would the Hassam Paving Company have had to give the bond if they had obtained the contract?

A. Sure,—it was required by the contract.

MR. McCAMANT: The evidence that would be most convincing would be a copy of the bond.

MR. CAREY: It is in evidence and shows that it was to protect the City of Hood River against infringement.

(The bond is produced and shown to the master in chancery.)

Q. Do you know, Mr. Straicher, what the premium was on this bond that Mr. McCamant called your attention to, dated March 29, 1913, for \$9,500?

A. I could find out by telephoning.

Q. Take up the fifth item of objection by complainants, John Hall, \$125.00.

A. That was for legal services.

Q. That was part of the expenses?

A. Yes, legal expenses.

Q. Mr. Gillingham claims that there was no voucher for that item, do you know whether that money was actually paid Mr. Hall?

A. The check is there for it.

Q. There was a check for that?

A. Yes, the money was taken out of the bank on a voucher.

MR. CAREY: Have you got the voucher?

WITNESS: I can bring the voucher over.

Q. The sixth item objected to by complainants, what do you say about that?

A. That was the premium on a bond for \$5,000 I believe, guaranteeing the City of Hood River against loss for any royalties. This \$50.00 was a renewal.

Q. There is no \$5,000 bond according to this record.

A. Maybe that bond had nothing to do with the contract. It was probably given after the contract was completed before the city would turn over the retained percentages.

MR. CAREY: Have you got the voucher?

WITNESS: We had a voucher for that.

MR. CAREY: We did not find any voucher.

WITNESS: Well we will furnish that with the bill.

Q. The seventh item of objection by complainants,—what can you say about that?

A. Charles E. Smith was the station agent. He had a voucher for this, I mailed the check with the freight bill,—freight on wagons I believe, down there.

Q. Freight on wagons used in the laying of this job?

A. Freight on wagons used, yes.

Q. Was that actually expended?

A. Yes, sir, we had a voucher for that.

Q. Do you know as a fact that that money was actually expended on this job?

A. Yes.

Q. Now take this next item.

A. That was cash that I gave the yard master for setting a car up to the loading platform.

Q. You know that was expense on this job, do you?

A. Yes.

Q. The next item is S. H. Tate?

A. That was for labor, I have the time check that the time keeper gave for that 4½ hours.

Q. Was this time check as a voucher furnished to Mr. Gillingham?

A. Yes, it was furnished to him.

Q. And on the voucher there is a notation of

Giebisch & Joplin paving account, how do you know that that refers to the Reliance Construction Company work?

A. Giebisch & Joplin had no paving work in Hood River or any other work that was done in 1913.

Q. Did the Reliance Construction Company try to save any money by using Giebisch & Joplin printed matter?

A. To cut down expense they used Giebisch & Joplin printed matter.

Q. Did they use this rubber stamp, "Paving Account," to distinguish it from their own work?

A. Yes, sir.

Q. Was this voucher shown to Mr. Gillingham and was that explained to him?

A. It was with the vouchers that he examined.

Q. It was with the vouchers that were furnished him?

A. Yes, sir.

Counsel for defendant offers in evidence the voucher referred to and the same is received and filed, marked Defendants' Exhibit "A."

Q. Do you know whether that labor was expended by the Reliance Construction Company on this job?

A. The time keeper said it was.

Q. That is all you know about it?

A. Yes, sir.

Q. The next item is July 15, A. W. Curry \$8.70, what was that?

A. There is the bill.

Q. Was this bill furnished among the vouchers to Mr. Gillingham?

A. No.

Q. When did you get this bill?

A. It was among Giebisch & Joplin's files instead of the Reliance Construction Company.

Q. I see that the words "Giebisch & Joplin" are stricken out of the bill, can you tell us of your own knowledge that this was used by the Reliance Construction Company?

A. It was, it was ordered by F. Rowley who was superintendent.

Q. Do you know what that was for?

A. One concrete chute to order, I presume it was for the mixing machine.

Counsel for defendant offers in evidence the voucher referred to by the witness and the same is received in evidence and marked Defendants' Exhibit B.

Q. Take the item July 29th, F. Rowley, \$69.20, what was that for?

A. That was a time check entered on the 29th and was credited back on the 31st so there is no entry there.

Q. So that \$69.20 should be taken into consideration?

A. It should be taken into consideration as an error. How that came about is that time check Rowley did not cash, and he gave me back the check and I gave him a bank check and I credited back the time check and charged the bank check.

Q. So this item of \$69.20 is not a proper item of expense to be charged the account?

A. It is credited here and it is proper to be charged in here.

Q. Let me get that clear. This is objected to.

A. He has taken the debtor side without taking into consideration the credit of \$69.20.

Q. So as a matter of fact, in the account that you made up, it properly entered into the account?

A. Yes.

Q. This item of July 30th, Giebisch & Joplin, \$37.60, what is that?

A. That was all right, that was an error in his charge.

Q. The item July 30th, Giebisch & Joplin, \$4.35, what is that?

A. That is team time for hauling material down to the dock.

Q. And is that an expenditure made for the benefit of this contract?

A. Yes, sir.

Q. And what is this item July 30th, Giebisch & Joplin, \$98.00?

A. Rent of dump wagons. There is a bill here for that.

Q. Is this the bill?

A. Yes.

Counsel for defendant offer in evidence the bill identified by the witness and same is received and filed and marked "Defendants' Exhibit C."

Q. Giebisch & Joplin paid that \$98.00 for the use of six wagons to the Reliance Construction Company?

A. Yes.

Q. The money was actually expended on this job?

A. Yes.

Q. What is this item, D. McDonald, \$2.55, what is that for?

A. Gasoline 75c, grease \$1.00, tape 25c, and various other items enumerated here.

Q. That was an expense on this job, was it?

A. Yes, it was material ordered by the time-keeper, I presume it was correct.

Counsel for defendant offers in evidence the bill referred to and same is received and filed marked "Defendants' Exhibit D."

Q. What is this item Sept. 13th, unloading cars at Hood River, \$15.65?

A. For unloading cars there just as it says.

Q. Was that done for the Reliance Construction Company?

A. Yes.

Q. Was it an actual expense for this job?

A. Yes, sir.

Q. That money was expended by the company, was it?

A. Yes, sir.

Q. What is this item Jan. 1, 1914, H. Mortensen, 90c?

A. I have it marked there.

Q. You have it simply marked labor here.

A. Yes.

Q. Was that an expense for labor on that job?

A. Yes, sir.

Q. The item Feb. 26th, Hood River Co., \$54.10, what is that for?

A. That was for a roller.

Q. Was that roller used upon this job?

A. Yes.

Q. That was an expenditure made on this contract?

A. Yes, sir.

Q. Of this total \$321.20, you said that \$37.06 is a wrong charge, did you?

A. Yes, sir.

Q. Is there any other error in ascertaining the profits of \$1,900.34 that you recall?

A. Not that I recall.

Q. How will this error of \$37.06 affect your statement of profits?

A. It will add that much to the profits.

Q. Then it would make your statement of profits \$1,937.40 practically?

A. Yes.

Q. There was some criticism, Mr. Straicher, about your books not having been closed, I believe—will you state the method you used in keeping the books,—why they were kept in this way?

A. It is not necessary to close a set of books unless you want to pick out some particular account, then it would be necessary to close the books.

Q. Are the books and vouchers of the Reliance Construction Company kept so that there could be an intelligent and correct estimate made of the profits that were made on this Hood River job?

A. Yes.

Q. And what would you say as to whether or not the books and vouchers submitted to the complainants on this account is a correct and fair statement of the profits made on this job?

A. They are with the exception of this \$37.00.

CROSS EXAMINATION:

Questions by MR. C. H. CAREY.

Q. Did you render a statement to the United States government annually of the condition of your business and the profits for each year?

A. The company did.

Q. How did you get that if the books were not closed?

A. You do not have to close the books in order to get that off.

Q. You did not make any entries in the books to close them?

A. It is not necessary to make them, you can just draw off the totals.

Q. And those entries charged in this account under date of January 19, 1915, which you have testified to, you made since this hearing began before the master and which included interest, expense and maintenance, was not taken into consideration, when you made your report to the government, year by year?

A. Yes, it is not charged to any particular account, it was charged in a lump sum, that would have nothing to do with the report to the government.

Q. In apportioning your interest and your expense and your maintenance to this particular contract, under that date you used a different ratio in estimating the proportion of maintenance and the proportion of expense to be attributed to this particular job, did you not?

A. Probably the total amount of expense and of maintenance was different and that would give a different ratio.

Q. Why did you use a different denominator?

A. I only multiplied that to four decimal places. There would probably be ten or fifteen cents one way or the other, you would have to carry it out to 10 or 15 decimal places to get down to the cent.

Q. In apportioning your maintenance account,

you used the denominator 289,683 and in apportioning your maintenance account you used a denominator 105,795.

A. I do not get that.

Q. In apportioning your maintenance account you used the denominator 289,683 and in apportioning your maintenance account you used a denominator 105,795.

A. I do not understand.

Q. You can see it here (showing paper to witness).

A. The interest and expense are not the same, you cannot figure it that way,—I do not think so.

Q. I am talking about the maintenance and expense.

A. I know.

Q. You will note that you have given about forty per cent more for the expense items in this account than you have for the maintenance.

A. There was not as much maintenance as there was expense.

Q. In proportion there was more according to this.

A. No, the total interest account amounted to practically \$2,100 and some odd dollars and the maintenance account only amounted to \$1,026.00.

Q. Just explain how you figure out how much interest should be charged to this particular job and how much your maintenance account should be charged.

A. I will explain, for instance if the total interest were \$10,000 and the total maintenance were \$5,000 this job would be charged with twice as much interest as it would be for maintenance.

Q. The proportion would be the same. you would distribute the two items among all the jobs on the same basis?

A. Yes, just the same.

Q. You did it that way, did you?

A. Yes.

Q. A great many of these jobs were taken before this paving job and completed before this paving job, were they not?

A. Yes.

Q. And in like manner many of them were taken after this paving job and completed after the paving job?

A. There was only one taken after and I think two or three jobs before, somewhere during the same time.

Q. I show you a diagram or chart showing the period of operation of the contract of the Reliance Construction Company on which it appears that the Hood River paving job lasted 147 days during the months of May, June, July, August and September.

A. The contract was taken sometime in March and of course the job was under way as soon as the contract was signed.

Q. And you think it should carry the overhead expense just the same?

A. Yes, for instance if they started in June, 1912, and worked to 1914, if there was a lapse of four or five months in between those two dates, you would have to charge your interest and your overhead expense.

Q. How should it be charged?

A. You would have to apportion it.

Q. Here is a single infringement,—one job on these streets in Hood River, do you think any part of the overhead expense should be apportioned to this one job in ascertaining the amount of profit?

A. I figured it the way I always have figured it and I always considered it was correct.

Q. What method did you take to apportion your maintenance and your expense or to distribute it?

A. By dividing the total amount of work that they did into the total dollars and cents of expense or interest, whichever the account was.

Q. What you mean is all the amount of work in dollars and cents?

A. Yes, in dollars and cents.

Q. You took the entire receipts of the company from all sources and then divided that by the receipts from this particular job?

A. No.

Q. What did you divide here?

A. The entire receipts of the company into the amount charged for expense, that gave me the per cent per contract.

Q. You took then the factor that would be indicated by the total expense in proportion to the total receipts of the company from all sources?

A. Yes.

Q. And applied that to this particular job?

A. The proportion.

Q. That is its proportion?

A. Yes.

Q. Notwithstanding the fact that many of those jobs were all completed before this particular job was taken by the Reliance Construction Company?

A. It did not make any difference whether they were completed before or after.

Q. Then you might according to your system of never closing your books, take into consideration expense incurred many years ago and charge it up on this job, could not you?

A. They could, but they did not.

Q. Well, I do not accuse you of doing that for many years, but you took about three or four years and applied it on this job of 147 days, did not you?

A. It amounted to more than 147 days.

Q. There were some of these jobs that you kept a special journal for, as in Idaho?

A. The timekeeper up there kept a sort of set of books.

Q. That was the Weiser job, was it?

A. Yes.

Q. Did you apportion some of that expense on this job too, according to your method?

A. Yes.

Q. Who had that contract on the Weiser job?

A. The Reliance Construction Company.

Q. Why was that not kept in the books like any other job?

A. It was kept,—the total amount is brought down here, it is all in the books,—the Weiser contract is here.

Q. Is the expense of the Weiser job here?

A. Yes.

Q. When was that job taken?

A. They moved their equipment from Portland up there on the 11th day of September, 1912.

Q. And when was it completed?

A. September 1914, I believe.

Q. Now comparing that job with this job, that one lasted very much longer, did it not?

A. Yes.

Q. Yet you put the entire expense into the bill with this job just the same?

A. That job amounted to \$152,000 and the Hood River job only amounted to \$26,000, almost or over five times as much.

Q. You said that you divided the total amount charged to expense by the denominator 289,683.88 to arrive at the per cent which you used to multiply the total amount received on each contract to ar-

rive at this proportionate charge to this contract, of \$604.82,—why did you change the basis? You seem to have changed it by using a denominator of 105,795.62 instead of 289,683.88.

A. That was done by eliminating all the Weiser and Boise contracts which were done by sub-contractors and they furnished their own equipment.

Q. Then you figure that because no equipment was furnished on those two jobs, there ought to be no maintenance charge?

A. There was no maintenance charged because there was no equipment used.

Q. Why did you not apply the same principle to the Hood River job?

A. Because there was some equipment used.

Q. Practically all the equipment used on this paving job was rented?

A. No, there was a mixer and a roller used.

Q. You produced a voucher this morning which you said the teams and wagons were rented.

A. I produced a voucher for \$98.00 for rent of wagons.

Q. Let us see,—this company had two other contracts at Hood River at the same time?

A. They had a pipe line and they built the head-works of intake.

Q. Now did you have any equipment that was used on this job that was not rented, if so state what it was?

A. Well, there was some wagons, I believe, and shovels and small tools.

Q. But you have given the percentage of the total maintenance as shown on your books, to apply on this Hood River paving job, just the same as if all the equipment was owned by the company,—you did not eliminate any of it as you did in the Weiser and Boise jobs?

A. This was a company job, there was no subcontractor.

Q. (By MR. McCAMANT, Master.) Counsel is asking you whether you eliminated any of this equipment in order to figure out the maintenance on this job.

A. No, I did not eliminate any of the total maintenance,—I figured the percentage. It is hard to segregate the actual maintenance on any particular job.

Q. Now I believe that you testified that the plant account of that company was \$15,000? Is it not a fact that it was reduced to \$9,000 before this contract was taken?

A. According to the invoice the plant was a good deal more than \$15,000—fully \$15,000.

Q. I do not ask what the true valuation was, but what I mean is that the plant was reduced \$6,000 prior to the time this contract was taken?

A. They did not take an inventory at that time, I cannot say.

Q. What is the fact about this \$6,000 having been eliminated from the plant account?

A. They sold a shovel for \$6,000, I believe.

Q. So it was \$9,000 instead of \$15,000 that was used in this work?

A. No, I could not put it that way.

Q. How do you account for the difference?

A. The way to get the plant account would be to take an inventory of it.

Q. Was not some part of this plant sold for \$6,000?

A. Yes.

Q. And does not that reduce the \$15,000 plant account by \$6,000?

A. It would if you take the plant account at \$15,000 and take off \$6,000.

Q. You did not take this out in estimating the amount of profits which you furnished to the master in this proceeding?

A. In consideration of the plant we furnished, we did not figure in any depreciation of the plant on this job.

Q. Your maintenance as charged has relation to the plant?

A. Yes, but that is not depreciation.

Q. I am not asking you about depreciation, but you apportioned to this particular job its proportion of the \$15,000?

A. I apportioned to this particular job its proportion of the maintenance.

Q. Counting on a \$15,000 plant whereas there was only a \$9,000 plant at that time altogether—that the company owned altogether, and only a very small portion of that was used on this particular job, most of the plant and equipment used on the job being rented from other sources on which you paid no maintenance charge at all, is not that the fact?

A. If we rent an article and there is repairs to that article, we would have to maintain it anyhow, for instance, if we should rent a wagon and the wagon should break, we would have to fix it and put it in as good condition as it was when we rented it, except the usual wear and tear.

Q. Repairs are in a separate account, are they not?

A. No, they are charged to maintenance, repairs are maintenance, that is what we use the maintenance account for.

Q. Well, the maintenance account is a general account of all repairs?

A. Yes.

Q. And if you rent equipment from other sources and do not repair it, you would not charge it against this account of profits?

A. No.

Q. As I understand it, you have a general maintenance account and you charge to this job its proportion thereof, instead of charging the job simply

with whatever repairs there might have been upon the particular equipment used.

A. I do not know. The books will show whatever transactions were made, I cannot remember that long.

Q. You stated that the tools and supplies were not charged to the job and therefore this contract would not be entitled to any salvage value thereof. What became of the tools listed in the report as amounting to \$216.00 to which your attention was directed?

A. The tools and supplies that were taken on the job from another job were not charged to this job, and the balance of the tools that were left when this job was completed was not credited to the job.

Q. Is it not true that the grand total of tools, supplies and repairs amounted to \$542.56, or two and a half times the salvage which should be allowed, that is \$250.00?

A. I do not know that, I would have to go through the accounts in order to find out the entire amount of tools charged to another job.

Q. According to your theory, as I understand your testimony on direct examination, you do not deem that anything should be allowed for salvage value of tools and equipment purchased and used on this job?

A. No, we did not do that.

Q. Is not that customary in accounting?

A. Not on contracts.

Q. Here we have a specific infringement and we want to find out what it costs to lay this pavement and how much was received; how would we go about it to get it?

A. At the time we took the job we had no idea of that.

Q. For the purpose of this inquiry, one way would be to find out how much of the plant—of the tools and equipment—was left and allow a reasonable amount for the salvage value of it?

A. If we had a bill of all the tools and equipment that were shipped down there that was not directly charged to the job, we could get that.

Q. You had all the tools and equipment left?

A. No, shovels do not last any particular time, and things of that kind.

Q. Well, you put in a liberal charge, apparently, for maintenance; what did this company rent from Giebisch & Joplin?

A. Rented some wagons and teams to haul stuff down from the freight house.

Q. Did you rent anything besides a roller from the county?

A. Not that I know of.

Q. When you made sale of some part of the equipment, there was \$250.00 allowance.

A. There is a bill for the \$250.00 allowed.

Q. Now you say the steam shovel was not used on this paving job at all?

A. No, it was never down at Hood River.

Q. Referring to the next item, didn't your company receive warrants from time to time for this work as it progressed?

A. Yes, a certain per cent—I forgot what it was.

Q. So that you practically had no capital invested in the job, but got every thirty days some warrants during the three months that the contract ran?

A. The work was started in the latter part of April, and the first warrants they received was on the 26th day of July.

Q. I thought the work begun in May?

A. Well, the first shipment was a shipment of tools.

Q. The actual construction, I mean?

A. I do not know.

Q. Somewhere around the first of June, and about 30 days after that you got the first warrants?

A. No, prior to that—there was a payroll in May of \$9,270.45.

Q. Now, can you show just what money was borrowed to use on this job, and just what interest was paid for money borrowed for this job, as distinct from your general interest account?

A. You cannot work it that way, because we transferred money from one account to another.

Q. Is it not a fact that most of the charges made for interest was for money other than this paving account?

A. It is kind of hard to say where the money would go without looking over the cash book.

Q. Well, it is for you to produce a statement of any money that you borrowed for use on this contract and a statement of the interest that you paid on account of it. As a matter of fact, the complainants claim that no interest should be allowed and that it is not a proper item to be taken into consideration at all, but if I understand your statement, you are attempting to charge here a proportion or percentage of your general interest account in proportion to the value of the receipts from the contract, without having anything to do with the actual amount of money you borrowed for use on this contract. Now, you said your books were experted, when were they experted?

A. The latter part of December, 1914, I believe.

Q. That was before this entry of January 19, 1915, was made?

A. January 15, I believe. The account was in the books and it was just a segregating of the accounts that had not been made.

Q. What I am getting at is, no expert accountant had ever approved your method of apportioning to this job these overhead expenses?

A. No certified public accountant had.

Q. Now, when the expert went over your books, did you draw off a trial balance sheet?

A. I did not draw off any for his particular benefit, no.

Q. Well, was one drawn off?

A. One was drawn off the 31st day of January, 1914—a balance sheet.

Q. Then you could close the books of that date and start afresh, knowing the amount of the balances at that time?

A. You could rule the accounts off.

Q. I am talking about closing your accounts and opening up fresh accounts—closing your books of that date.

A. I suppose you could.

Q. Well, you did, as a matter of fact, although you did not put the entries in the books, when you drew off the balance.

A. Put the entries in the book—no.

Q. Well, for instance, you attempted to apportion to this particular job these overhead expenses anterior to this date?

A. Before closing them up, I had to make these entries under date of January 15, 1915. In order to close the books I had to make those entries.

Q. Well, you would make those?

A. You would have to make them before you could close the books.

Q. Did not you consider it incumbent on you to close your books once in a while, Mr. Straicher?

A. I do, but when you took them out of my hands, I did not do it.

Q. Did you ever render a statement to your owners as to loss and gain account?

A. Whenever they asked for it.

Q. Did not you have to close your books to do that?

A. Not necessarily, you can tell what the loss and gain is without closing your books.

Q. If you did make any such statement to them from time to time, you would have charged off all the expenses up to that time, so that they would not appear in this account?

A. Well, I told them how the account stood from time to time, but that would not have settled it by any means.

Q. Now, this job began in May; had you prior to May, 1913, rendered any statement to the stockholders or owners of the loss and gain?

A. Not to my knowledge; I do not know, I may have done so.

Q. Had any expert gone over your books prior to May, 1913?

A. Not to my knowledge.

Q. Had you closed your books prior to that time?

A. No.

Q. Or drawn off any trial balance or otherwise?

A. Not that I remember of.

Q. Who were the officers of this company?

A. Mr. Giebisch is one, and Mr. Packet is another, I do not know who the others are.

Q. The firm of Giebisch & Joplin had an interest in the Reliance Construction Company?

A. They owned part of the stock.

Q. They are in the contracting business also, are they not?

A. Yes, sir.

Q. What contract jobs did they have of any kind when this work was going on?

A. I cannot tell you offhand.

Q. You kept the books, did not you?

A. Yes, but I have not the books with me.

Q. Did they have many contracts?

A. I would not make a statement without my books.

Q. Well, were there one or two contracts or a good many?

A. I would not say, they might have been working on one, they might have been working on a hundred.

Q. Your memory is a little bit faulty about that and you do not want to answer.

A. No, in a period of three years it is hard to remember, and if I said a dozen, you would probably have asked me what they were, and I would not have remembered them.

RE-DIRECT EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. Mr. Straicher, counsel has asked you on cross examination assuming that many jobs were done by the Reliance Construction Company. Now, as a matter of fact, tell the court what jobs the Reliance

Construction Company had and what they amounted to in the aggregate?

A. They had a sewer here on 49th and 50th streets, a sidewalk in Arlington and a sewer in Arlington, and Hood River paving and headworks at Hood River, and a pipe line at Hood River, and grading and sidewalks in Weiser, and a sewer in Boise, Idaho.

Q. That was all the work the company had, was it not?

A. Yes, sir.

Q. And during what period of time did that work extend over?

A. From March, 1913, to January, 1914, I believe, and finally closed up in August, 1914, when they got the last money out of Weiser, somewhere around there.

Q. And this contract in controversy was signed up in March, 1913, and finished when?

A. It was finished the latter part of September, 1913.

Q. Now with regard to this maintenance, I understand you that the company made whatever repairs were required on the rented equipment and charged it all in this maintenance account?

A. It did, if there was any; I do not remember offhand whether there was or not.

Q. You have no way of telling what repairs were made on this particular job?

A. No.

Q. That was not segregated?

A. No.

Q. (By MR. McCAMANT, the Master.) Mr. Straicher, before you leave, have you looked up the bill for these bond premiums?

A. As to that \$50.00 item, I can find no invoice of that. I went over and tried to get a duplicate but I could not.

Q. (By THE MASTER.) Have you a record of the \$95.00?

A. Yes, I have a record of the bill and invoice.

THE MASTER: This shows very clearly that it was a bond against infringement of the patent.

Q. Do you know whether that \$50.00 charge is a renewal?

A. I was under the impression that it was, but looking over the records, I cannot tell.

Witness excused.

JACK ELDON is called as a witness for the defendants and, being first duly sworn, testified as follows:

DIRECT EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. What is your occupation, Mr. Eldon?

A. I am accountant and estimator for Giebisch & Joplin.

Q. Are you familiar with the books of the Reliance Construction Company?

A. To a certain extent, yes.

Q. Did you go over the statement filed here by the Reliance Construction Company and their books, showing a profit on this Hood River job of \$1,900?

A. To a certain extent.

Q. Have you gone over the objections filed by complainants to that statement of profits?

A. I have read them over.

Q. Have you checked them up with the books of the Reliance Construction Company, also?

A. Most of them.

Q. I wish you would take up the first objection of complainants to this statement of profits—interest, expense and maintenance—and state whether or not in estimating the profits on this Hood River job these are proper items to charge or not?

A. I think each and every one is a proper item of charge. In making estimates of work, estimators must allow them; if they do not, they will come out at the small end if they should happen to get the work. You cannot do work without having some interest and some expense and some maintenance.

Q. Are you familiar with the books and vouchers for this job so as to know whether or not this interest charge and expense charge and maintenance charge are reasonable charges on this job or not?

A. I would consider them very reasonable, in fact I would consider them about one-third of what

any other company in the same line of work would charge.

Q. Why?

A. One reason is I not only did the estimating, but I did a great deal of the managing, and Mr. Straicher not only did the bookkeeping for this part of it, but did other work besides and that would hold our overhead down very low on it.

Q. That \$604.80 is proper for overhead as charged to this job, is it?

A. Yes.

Q. Now this maintenance, \$258.19, what is that?

A. That is maintenance and repairs of the plant -- keeping the plant up so they could do work—so they could go out and do a job with it.

Q. Was any of the equipment of the Reliance Construction Company used on this job, or was it all rented?

A. There was some of the Reliance Construction Company's equipment used and some of it was rented.

Q. And this item of interest, \$199.64, can you give us any idea as to whether that is a reasonable amount of interest to be charged to this job?

A. I consider it is very low. At the time I estimated this job I estimated two and one-half per cent of the total contract, which I thought would be required to carry the contract on, but by using other funds of the company it was cut down some.

Q. Now what do you say to this objection of complainants to the second item—discount on warrants, \$133.79?

A. Well, I myself made the agreement to sell the warrants for 99½ when they came out, rather than hold them for probably six months and get par for them, thereby saving about 1½ per cent.

Q. What can you say as to the objection of complainants to the third item—no salvage?

A. Well, it is customary for this particular firm to maintain a plant to work with on any job, and any little necessary thing as small tools they would have to buy, and any one who has been in the contracting business knows that picks, shovels, rakes, brushes and hose are very destructible articles and they are very liable to get broken or lost, and these things are charged to the job.

Q. Did you charge this job with equipment brought to it from other jobs?

A. No.

Q. And did not credit it with what equipment was on hand when the work was done?

A. No.

Q. What would you say about this charge of \$216.60 as to whether or not it was a reasonable charge for tools on a job of that size?

A. Well, it is less than one per cent, and I would consider it very reasonable.

Q. Coming down to this seventh objection, do

you know anything about these charges as to what they are for?

A. Nothing, only so far as I learn from Mr. Straicher and the books.

Q. You have no personal knowledge yourself?

A. No, except this unloading cars at Hood River, I know that that had to be done.

Q. Now, from your examination of the books and vouchers and knowledge of the company's transactions there, what would you say as to whether or not this statement of profits is a fair and correct statement of profits on this job, or is it an inaccurate statement?

A. I consider it a fair and correct statement.

Q. Were these books kept with the idea of concealment of any profits made on this job?

A. No.

Q. You were perfectly familiar with the business?

A. Yes.

Q. Were these the books the stockholders used in settling their affairs?

A. These are the only original books.

CROSS EXAMINATION:

Questions by MR. C. H. CAREY:

Q. How much money did the company have borrowed for use on this particular job?

A. I cannot say how much they borrowed—at

times they had large sums and at times small sums. They had to have money to do business with.

Q. Do you know of any money that was borrowed by the company for this job on which they paid interest and if so state the amount and the date when borrowed and from what bank.

A. I think there was money borrowed from one of the banks at Hood River to handle this job; I do not know just the amount or the date.

Q. Do you know any amount of interest that was paid for money that was used on this job?

A. Yes, there was some interest paid for money used on this job.

Q. State what it was.

A. I do not know just what it was.

Q. You have testified that this account is correct and properly prepared and that the books were all proper and that you know all about them; now, then, I want a statement of what money was borrowed and used on this job and what interest was used or paid for money borrowed.

A. I think you are mistaken, I never said that I know all about them.

Q. What is your position with the company?

A. Estimator—everything from office boy up to assistant manager.

Q. Are you one of the directors or officers of the company?

A. No, sir; not one of the officers.

Q. Were these books partnership books prior to the time the Reliance Construction Company used them?

A. These books were Reliance Construction Company books.

Q. Partnership books?

A. Prior to the organization of the Reliance Construction Company there was a partnership.

Q. I want to know whether any partnership transactions figured in these books.

A. Nothing that I know of.

Q. Mr. Straicher, when he was on the stand, said that these books were opened up as partnership books and were then merged into a corporation.

A. Prior to the organization of the Reliance Construction Company there were several partnerships.

Q. You say you made sales of warrants that were received by this company, or arranged for their sale—they were interest bearing warrants, were they not?

A. After a certain date.

Q. What was the interest?

A. It seems to me it was six per cent—I do not remember just now, but it seems to me it was something like six per cent.

Q. What equipment owned by the Reliance Construction Company was used on this job?

A. Shovels and picks—I cannot give you everything. There were some wagons and small tools. I cannot give an inventory.

Q. Were you there?

A. I was there a number of times.

Q. Now just tell me how many wagons were hired from Giebisch & Joplin that are referred to in this statement, and how many from other persons? And how many were owned by the Reliance Construction Company?

A. I do not know how many were hired from Giebisch & Joplin, the statement will show how many there were. I do not remember just how many of the Reliance Construction Company wagons there were.

Q. Did the Reliance Construction Company have any wagons?

A. Yes.

Q. How many?

A. I think they had six or eight, I wouldn't be positive about that.

Q. What other equipment did they have besides six or eight wagons?

A. Tools, picks and shovels—small tools.

Q. Have you got a list of them?

A. Not with me; no, I did not keep a list. There is a record of all tools bought.

Q. I want the tools that were used on this job that belonged to the Reliance Construction Company that were not rented?

A. I cannot give you that.

Q. Is there any way to get at it from the company's records?

A. I do not think so.

Q. It is up to your company to say or show just what equipment was used there on which maintenance is charged—can you furnish any statement of that?

A. Maintenance charge is a general per cent maintenance charge; so far as furnishing an invoice of axes, saws, hammers, lineal feet of hose, and the number of picks and shovels I cannot do that, and I do not think anyone else can do it.

Q. You have charged for this job certain items of expense for articles of that kind, purchased during the running of this job, and I understand some of these tools were on hand when the job was completed—have you any record that shows what they were?

A. No. As I said, we never made an invoice when we took an outfit on the job.

Q. But you allow nothing at all for salvage on those things that were bought, and yet you charge the entire cost of all those articles that were used on this job, without making any showing how many were on hand when the job was completed.

A. No, we did not charge all the tools taken on the job, only such tools as were bought.

Q. There was over \$200.00 worth of tools charged to this account.

A. That is a very small item.

Q. Now, you are unable to give me the items of

the equipment put in by the Reliance Construction Company that was used on this job?

A. I cannot give the items in detail.

Q. Can you give in detail or otherwise the equipment that was rented or procured from other sources?

A. I cannot offhand.

Q. How did it compare in value or quantity; is it not a fact that the bulk of the equipment was rented?

A. In what way do you refer to bulk—the amount of money represented?

Q. Well, say in money?

A. Well, there was a mixer rented and some wagons and a roller; the roller alone would cost as much as two-thirds of the rest of them.

Q. I call your attention to Defendant's Exhibit "C," purporting to be a list of wagons used and procured from Giebisch & Joplin on which the Reliance Construction Company charges in this account \$98.00 paid for rental; is that a correct statement of the wagons that were procured from Giebisch & Joplin?

A. This is not a statement of wagons rented, but it is a statement of wagons rented by the time-keeper for the job, I think that is correct.

Q. These wagons came from Giebisch & Joplin, did not they?

A. I think they did, but I did not check them.

Q. It shows the time of all wagons that were used on the job?

A. No, I take it that was a statement of wagons that belonged to Giebisich & Joplin that were used on that job.

Q. Have you any statement of any other wagons that were used on the job?

A. Not that I know of.

Q. Are you willing to swear that there were five or six wagons that belonged to the Reliance Construction Company in addition to these, that were used on that job?

A. I cannot state exactly how many, because there may have been more or less.

Q. How many wagons can you use on a job like that?

A. Oh, you can use as many as you want to. I think it required probably about six wagons for hauling rock and some wagons for hauling sand, and they might have used some wagons to get supplies and for hauling equipment from one place to another.

Q. Well, the sand was delivered right on the job, was not it?

A. No, the sand was not delivered on the job, but on one of the streets by the side of it. It was delivered there for the reason that the people who delivered the sand had to get it where the river was at a certain stage, and they piled it up at that point.

Witness excused.

F. H. PETERSON is called as a witness for the defendant and, being first duly sworn, testified as follows:

DIRECT EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. What is your occupation, Mr. Peterson?

A. Credit man for Fisher, Thorsen & Co.

Q. Have you had any experience in keeping books and accounts?

A. Yes, sir.

Q. Have you had occasion to go through the books of the Reliance Construction Company?

A. Yes, sir.

Q. Explain when and how that happened and for what purpose?

A. That was about December, 1914. I went over the books at the request of some of the stockholders.

Q. And did you in doing that familiarize yourself with the books of the Reliance Construction Company?

A. Fairly well.

Q. Are you familiar with this statement of profits, showing somewhere about \$1,900.00?

A. I looked over one of these papers a few days ago.

Q. Have you also looked over the objections of the complainants to some of the items in this statement?

A. Yes, sir.

Q. I wish you would tell us about this first objection filed by complainants here to interest, expense and maintenance. What about that?

A. Well, every contract is subject to its share of expense. I doubt if these items were charged to the job, at the time I went over them the books had not been closed.

Q. Do you know what this item, \$199.64 interest, represents?

A. That is hard to do.

Q. What would you say to that as a proper item to charge against the job?

A. In closing a set of books the interest expense and maintenance have to be charged somewhere, either to profit or loss or divided among the different contracts.

Q. We are trying to find out whether that is a reasonable amount of interest to be charged.

A. If it is a proper proportion as compared with other contracts, I would say it is O. K.

Q. There seems to be no dispute about the method used to apportion this amount, but what can you say as to whether the method used to apportion that interest was a fair and reasonable one for the Hood River job as shown by the books.

A. I should consider it O. K.

Q. Explain why.

A. I noted in going through the books money would be transferred from one bank account to another; for instance, the Bank of Weiser—they

would draw money from the Bank of Weiser and transfer it down to the Butler Bank at Hood River to help pay the bank balance there or to take care of the payroll; if they had money borrowed at that time, it was drawing interest, so naturally the Hood River job should pay interest on whatever amount they used.

Q. Well, what can you say of the books of the company whether the interest account was handled so as to keep the interest down to a reasonable amount or were they extravagant with their interest in the business of the company?

A. I do not remember in going over the books that they had any large cash balances at any particular moment. If they had they would reduce the amount of indebtedness to the banks.

Q. What can you tell us about this item of expense \$604.82—whether or not that is a reasonable item of expense to be charged to this Hood River job?

A. As I understand it, this interest, expense and maintenance was handled in the same manner—they were charged to the different contracts its proper amount.

Q. What do you say as an accountant as to whether that was a fair method of ascertaining the expense to be charged to the Hood River job?

A. I consider it so.

Q. Would that be an undue amount of expense for this Hood River job?

A. Not if they figured it properly.

Q. You heard the statement of how it was figured—do you consider that a proper way of figuring it?

A. Yes.

Q. Now, this item of maintenance, \$258.19, what do you say as to whether that was a proper charge or not?

A. Yes, sir; it is.

Q. What do you say to the second objection, discount of warrants, \$133.79? Is that a proper item to be charged?

A. Yes, sir.

Q. Explain why.

A. To turn their warrants into money unless they wished to carry their old warrants for six months, I would consider one half of one per cent a very small discount on warrants.

Q. Now, what do you say about the third objection of complainants, a charge of 25 per cent salvage, is that a valid objection or not?

A. Well, I have been treasurer and bookkeeper for a great many firms for the past fifteen years and we have handled such things as tools brought onto a job just exactly the way these tools were handled.

Q. That is, they worked it substantially in the same way?

A. Yes, that is about the only way they could work it.

Q. Explain why.

A. Every time they start a new job, it might be six months or it might be a year, during which time such things as hammers, saws, shovels, and small tools become lost, and we find that every time we start a new contract we have to buy new equipment, and they take all the tools that they have left, without charging them to the contract, because they are already paid for, but any new tools purchased they charge them to the contract.

Q. That is a rough and ready way of getting at the matter?

A. Yes.

Q. You do not know anything about the seventh item of objection; you have no personal knowledge of that at all?

A. No.

Q. What can you say, Mr. Peterson, as to whether the books of the Reliance Construction Company have been honestly kept to show the condition of the company?

A. I checked each item in December, 1914; I did not make any change in that account.

Q. Were these the books that the stockholders used in accounting among themselves in their business?

A. These are the only books that I know anything about, the only ones ever shown to me.

Q. They were used in the actual business of the company, were they?

A. Yes, sir.

Q. And did you find anything in the accounts kept by the books and vouchers to throw any doubt on the honesty and good faith of the way these books were kept?

A. No, sir.

Q. Was this statement of profits, \$1,999.00, made for the purpose of this suit or was it simply a correct showing of what the books contained?

A. It is an absolutely correct showing of the money expended on the contract.

Q. Was there any effort, in figuring this up, to conceal any profits made on this Hood River contract?

A. I do not see any.

CROSS EXAMINATION:

Questions by MR. C. H. CAREY:

Q. Some of the entries have been made since this examination began, have not they?

A. Yes, sir.

Q. They were not in the books when this examination began?

A. No, sir.

Q. Did you draw off a balance sheet when you examined the books?

A. Yes, sir.

Q. Mr. Thorsen is interested in this company, is not he?

A. I believe so.

Q. You represented him when you went into the books?

A. I experted the books. Mr. Thorsen was one of the gentlemen who requested that it be done.

Q. Did he request a statement?

A. Yes.

Q. Have you got that?

A. No, sir.

Q. About what date was that?

A. About December, 1914.

Q. You closed the books of that date so far as your statement is concerned?

A. Yes, I took a statement of the books at that time.

Q. At that time you did not distribute any overhead or maintenance or interest to this particular job?

A. No, sir.

Q. In making up that statement, did you know how much interest was actually paid for money borrowed for use on this particular job?

A. It did not show.

Q. The way this interest charge is made in this final entry on this account is to take a distributive portion of the general interest account and apply it to this particular job?

A. Yes.

Q. Now, is it not a fact, and I will ask you as an expert, if it is not a fact that interest is a

direct charge and is so treated by accountants in their books?

A. They had several bank accounts, I find, in going through the books. If they would run short of money, say at Hood River, they would take and check out \$1,000 or \$1,500 on some bank, say at Weiser, or the United States National Bank of Portland, and transfer it to Hood River. Now they would not pay interest on such checks, it was just shifting the bank account, but they were paying interest on money borrowed, and naturally interest on any money so transferred for use on this job would be chargeable to this job.

Q. Now, this job ran about 147 days, during that time warrants were constantly being received which were cashed at a discount and it is fair to say, then, that there was no appreciable amount of cash capital of this company used in handling this contract, is it not so?

A. Well, it would look like the money to carry on this job was all borrowed.

Q. It would look like before any disbursements were made of any consequence that they had received some warrants and cashed them and got the money with which to pay for it.

A. No, their check stubs will show, Mr. Carey, that money was transferred up there.

Q. Take the account as furnished here, showing that disbursements began April 28 when labor bills began to be paid, and in May the total amount of

payments were less than \$1,000.00, and in June they were not much more, and the credit side of the account shows that on July 26 warrants were sold to the amount of \$5,441.00, so that in the very nature of things they could not have disbursed very much money more than what they got out of the cashing of those warrants at that date, and that subsequently, August 6, they sold \$7,900.00 worth of warrants, and on August 22 they sold \$8,500.00 worth of warrants, and on September 20 another \$1,700.00 worth of warrants, so it appears on the face of this account practically all the capital used in the transaction was obtained by receiving city warrants and cashing them, yet they charge a proportion of the general interest account to this job, now what have you to say to that?

A. Well, I look at it like this, the total of the work was \$26,000.00, they only paid out \$199.00 for interest, and it seems to me that they got off rather cheap, that would be less than one per cent.

Q. Of course, I understand that interest is to be charged in this account for money borrowed for this job, but only for interest on money that was actually borrowed for this job, and I fail to see why you say that what was paid for interest was for money borrowed on this job.

A. Well, we consider that a contractor would be entitled to interest on such money as was transferred from his bank to be used on this job.

Q. If he had a certain amount of money set

apart for use on this job, I can well see that interest ought to be allowed and charged to the job, assuming that interest is chargeable at all, which I deny, yet they go another step and general expenses are apportioned to this account, not in accordance with the number of days, or the profits on the job, but the proportion is taken of the entire expense of the company in all of its operations, based on the total amount of income the company got from all of its contracts, is that the customary and usual way of estimating the expense on a job of this kind? We close our books once a year. Now from the evidence I have listened to, this concern had a number of contracts, and this was apparently the only time they ever closed their books when they made these entries, so they had a lot of contracts all during the same period and the bookkeeper apportioned it according to the total amount of contracts carried on.

Q. That is, the income or receipts on all the contracts,—do you keep your books that way?

A. No.

Q. Did you ever hear of any bookkeeper that ever did that?

A. Our books are closed once a year.

Q. It appears here that, according to the statement, contracts were taken before and in fact closed before the Hood River paving job was undertaken, and after it was completed, other contracts were taken and closed, and yet there is apportioned to

this particular job maintenance and interest from the entire history of the company in all its contracts; would you consider that a proper method of ascertaining what should be a proper debit to this particular job?

A. From what I know of their books I would say yes in this instance.

Q. That is, because their books were not closed?

A. Yes, because all of the contracts were in such a short time.

Q. The contracts covered three years.

A. That was the first time they closed their books.

Q. Now, assuming that their books had not been closed, they ought to apportion this charge according to the total number of days the capital was used, should not they?

A. No.

Q. Why?

A. Well, suppose that there was six months that nothing was done, they should charge for those six months.

Q. That does not appear to be the case here. The contracts were continuing contracts.

A. I cannot see where it makes any difference how that expense account, maintenance and interest is separated—whether all of the profit is allowed to go into the loss and gain, or the expense and overhead charged to that account, or whether it was, in this instance, it is better to handle it

in the way they have in case of a law suit, because each contract should stand its proper proportion of the overhead, and if it is allowed to go into the loss and gain account, the profits would stand out more than \$1,900.00, and the amount that should have been charged to this contract would be in the loss and gain account.

Q. Let me ask you,—take an infringement suit where the object is to ascertain the difference between the cost of manufacture and the receipts,—what the profits of the job are,—would you take into consideration any overhead expense or any general maintenance charges, or any other indirect book entries?

A. I would; yes, sir.

Q. Would it not be proper, rather, to take into consideration simply the items that affect the particular job as such?

A. I consider the overhead naturally affects every job.

Q. Well, then suppose you had the manufacturing of a certain article that was infringed, say a machine that was built in a factory or machine shop, and you were going to find out how much the difference between the cost of the manufacture of the machine was and how much it sold for in order to find out what the profit was that was made by the infringement,—would you in your account of cost take into consideration these overhead charges that you spoke of?

A. Yes, sir. I believe from talking with you that if they took and charged the overhead and maintenance without putting it together, according to your theory, that the contract would have to stand a daily expense of 147 days during that period you would find that it would increase their expense rather than reduce it.

Q. I am eliminating the entire overhead expense as not a proper charge against this account, but assuming now that any overhead was to be charged, I would say that the method used in this account was unusual.

A. I think it is more than fair.

Q. Do you keep Fisher & Thorson's books?

A. No, I am credit man,—I used to be book-keeper.

Q. You know how their books are kept?

A. Yes, sir.

Q. Do they charge their overhead expense in proportion to the cost or selling price of the goods?

A. It would hardly make any difference in per cent whether you work on the cost or selling price.

Q. Which way do you do it?

A. On our cost.

Q. Does not every bookkeeper do that?

A. No, some work on the selling price.

Q. What I am getting at is this gentleman did not do that when he got up this last statement, and I am asking you whether it is customary to do it

in the way he has done it. I understood you to say that it was customary.

A. I do not think I understand you, judge.

RE-DIRECT EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. Counsel asked you in cross examination about entries made since you examined the books, did not entries about that matter appear in the books in some form?

A. They were in their regular places, but the books had not been closed.

Q. These entries made since this examination, was done in order to ascertain the profit?

A. No, sir.

Q. As a matter of fact this contract commenced in March and ran a good deal longer than 147 days?

A. I understand the last warrants were paid in September, and they had completed their work ahead of that date.

Q. Is it not a fact that these warrants did not come for sixty or ninety days after the expense occurred, so that they would be paying interest for sixty or ninety days?

A. I believe so, yes, sir.

Q. Now you stated on cross examination that the method used in distributing this interest, overhead, and maintenance, is more than fair, I wish you would explain why that is more than fair and

why the same or a less favorable result to the complainant would be reached by a different method?

A. That is because a company can actually carry on half a dozen contracts at one time cheaper than they can carry on one contract at one time.

Q. Is it not a matter of fact that all the expenses of the Reliance Construction Company had to be paid out of these contracts which constituted its entire business?

A. Yes.

Witness excused.

JOSEPH PACKET is called as a witness for the defendants and being first duly sworn, testified as follows:

DIRECT EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. What is your position with the Reliance Construction Company, Mr. Packet?

A. I am president of the company.

Q. I understand from the testimony of the complainant here that they are endeavoring to show that the Reliance Construction Company wilfully and maliciously infringed this patent,—I wish you would state whether or not the company took any advice as to the validity of this patent and whether they relied on any legal advice in taking this contract?

A. Well, I was informed that the Hassam Pav-

ing Company's patent rights were worthless,—that they had no patent to infringe, and relying upon that advice the company took this contract.

Q. Has the company made any other attempt to lay Hassam pavement other than the one in this case?

A. No, sir.

No cross examination.

Witness excused.

Leave is granted to the defendants to file a copy of such portions of the charter of Hood River in force in 1913, when the work in question was done, as they may elect, and complainants reserve their objections to the admissibility of the same when offered, upon the ground that it is immaterial and irrelevant.

JOSEPH G. GILLINGHAM is recalled as a witness for the complainant, and having been heretofore duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by MR. C. H. CAREY.

Q. I call your attention to the chart which I now show you, and ask you whether you made that up?

A. I did.

Q. Is it correct?

A. Yes, so far as their books show.

Q. And the date or period relating to this work

in question, April 26, 1913, to September 20, 1913, how did you get those dates?

A. From the first charge in their books and the date on which they received the last payment.

Counsel for complainants offers in evidence the chart referred to by the witness, and the same is received and filed in evidence, marked "Complainants' Exhibit 7."

Counsel for defendant objects to the introduction of the same as incompetent, irrelevant and immaterial and not the best evidence, and the same is received subject to the objection.

Thereupon the testimony herein is completed except for the admission of the deposition of Mr. E. O. Hall, and such portions of the charter of Hood River as the defendant may desire to introduce.

And thereupon this matter is adjourned to be argued hereafter at such time as may suit counsel.

.....

Master in Chancery.

Parts of the charter of Hood River in force in 1913 was introduced in evidence, and by such charter it is provided as to improvement of streets and assessments to pay therefor, as follows:

CHAPTER VIII.

OF STREETS—THE GRADE AND IMPROVEMENT.

Section 49. The Common Council shall have

power and authority whenever it deems it expedient, to establish or alter the grade of, and to improve or repair any street or alley, or any part thereof, now or hereafter laid out or established within the corporate limits of the city, and the kind of improvement or repair shall be such as the council shall provide. Such power and authority shall include the right to improve, build or repair the sidewalks, pavements or curbing on any street or alley, and to determine and provide for everything convenient and necessary concerning such improvements, alteration or repair; to provide for the construction, cleaning and repairing of side and crosswalks adjacent to property, by the owner thereof, or by the city at the expense of such owner, and that such expense be a lien upon such property.

Section 50. The Common Council may, by ordinance, delegate the powers to establish the grade of and to improve and repair side and crosswalks hereby given to any committee or officer of the city; and prescribe (d) rules and regulations not inconsistent with this act for the enforcement of such power and for making the expenses of such improvements, construction, alteration and repairs a lien upon the property liable therefor, or the council may proceed in the manner hereinafter provided for the grading and gravelling any street or alley; provided, however, that the City Council may pay for the improvement, alteration or repair

of any street or alley or part thereof, out of the general fund of the City of Hood River, Oregon.

(Note. As amended by vote of the people at a special election held September 22d, 1908, pursuant to ordinance No. 158.)

Section 51. The work of improvement by grading or gravelling any street or alley shall be let by contract to the lowest responsible bidder, who shall give a bond to the City of Hood River in such sum as may be determined upon by the street committee, not exceeding the contract price, conditioned for the faithful performance of the work to the satisfaction of the street commissioner and the committee on streets, with surety approved by the street committee; and the provisions shall be in force by action in any court having jurisdiction of that amount, in the name of the City of Hood River.

Section 52. No contract to grade or gravel any street or alley shall be let till after the recorder, by order of the Common Council, shall have given ten days' notice thereof by publication in some newspaper published in the City of Hood River, or by posting notices thereof in three public places in said city not less than ten days prior to the time of letting such contract.

Section 53. Such notice shall state the time and place when and where bids for such contract or contracts shall be opened and considered; shall refer to the ordinance providing for such improvement by date and number, and shall specify what

part of such improvement or repairs shall be let in one contract, and the time within which the same shall be required to be completed.

Section 54. If no remonstrance be filed, the contracts to grade and gravel such street or alley may be let according to said notices. Provided, that the street committee or council may reject any or all bids.

Section 55. If a remonstrance be filed signed by a majority of the owners of the property abutting on said street or alley to be so improved or repaired, no contract shall be let therefor until the council shall reconsider and determine the necessities of such improvements or repairs; but if, after consideration by the council of the ordinance requiring and directing such improvement, two-thirds of all the councilmen shall vote for the same, and the mayor shall again approve the ordinance, the contracts for such improvements or repairs may be let as if no remonstrance had been filed—either upon the bids already received therefor, or the recorder may give notice again as provided in Section 52 of this act, as the council shall direct.

Section 56. After the probable cost of such improvement or repairs has been ascertained, and the proportionate share thereof to each lot, or part of lot, and acreage property liable therefor has been determined, the Common Council shall declare the same by ordinance, and direct the recorder to enter in the docket of city liens a statement there-

of containing: (1) A description of each lot, part of lot, or acreage property liable to such improvement; (2) the name of the owner or reputed owner thereof, or that the name of the owner is unknown; (3) the sum assessed upon the said property, and the day of entering the same in the said docket of city liens, but such date need be given but once for all the entries made therein on the same day. For all purposes of this chapter, any number of lots, parts of lots or acreage property owned by any one person may be assessed together, but each part shall be liable for the assessment of the whole.

Section 57. The docket of city liens is a public writing, and the original or a copy, certified by the city recorder, of any matter authorized to be entered therein are entitled to the force and effect of a judgment; and from the time of the entry therein of an assessment against any property, the sum so entered is to be deemed a tax levied and a lien against said property, and all other property within the City of Hood River then or thereafter owned by such person, which lien shall have priority over all prior or subsequent liens or encumbrances whatever upon the property against which the costs of said improvement or repairs is assessed, and priority over all subsequent liens or encumbrances on all other property in the city owned or afterwards acquired by the person owning the property against which such assessment is made, and shall be enforced in the manner in this chapter provided.

Section 58. If any assessment levied pursuant to this chapter which is not paid within twenty days after the same is entered in the docket of city liens, it shall be the duty of the city recorder to issue a warrant for the collection of the same, directed to the marshal, or any person authorized to collect delinquent taxes due the city, which warrant shall have the force and effect of an execution against real property, and shall be executed in like manner, except as in this chapter specially otherwise provided.

Section 59. Such warrant shall require the persons to whom it is directed to forthwith advertise the property against which such assessment was made, or other property against which such assessment is a lien, to sell the same, or such a part thereof as in his opinion can be sold separately to advantage sufficient to pay such assessment, together with interest, cost and disbursements, in the manner provided by law, and return the proceeds of such sale, except his fees and cost therein, to the city treasurer and the warrant to the city recorder with his doings indorsed thereon, together with the receipt of the city treasurer for the proceeds of such sale.

Section 60. The city recorder shall keep a record of the returns of sales made for taxes and assessments so made, showing the description of the property so sold, the date of the sale, for what assessment the sale was made, the name of the pur-

chaser, the amount of the costs of advertising and making such sale, the amount of the tax, the name of the purchaser.

Section 61. The person executing the warrant shall immediately make a certificate of sale, describing the property so sold to the purchaser, stating that the property was sold by virtue of a warrant from the City of Hood River, and the date thereof, for a delinquent tax or assessment, and the amount bid therefor by the purchaser. The style for the warrant for collection of delinquent taxes or assessments shall be: "In the name of the City of Hood River."

Section 62. Within two years of the date of such sale, the owner, his successors in interest, or any persons having a lien by judgment, decree, mortgage or otherwise on the property so sold, or any part thereof, may redeem the same in the manner hereinafter provided.

Section 63. When any tax or assessment or lien of any kind becomes delinquent, any person having a lien thereon by judgment decree, mortgage or otherwise, may at any time before sale of such property pay the same; and such payment shall discharge the property from the effect of the tax, assessment or other lien thereon; and the amount of such delinquent assessment, tax or lien, and all accruing costs and charges, if any, so paid, is thereafter to be deemed a part of said judgment, decree, mortgage or other lien, shall bear like in-

terest, and may be enforced and collected as part thereof.

Section 64. Any person holding a certificate of sale for taxes or assessments may pay any such subsequent delinquent assessment or tax, either city, county, state or school, taking duplicate receipts therefor, and upon filing one of the said receipts with the city recorder, the recorder shall immediately note the amount so paid on the same page with the records or abstracts with the original sale, together with the date of such payment; and from the time of such entry the amount so paid shall become as and be deemed a part of the original purchase price bid at the sale thereof.

Section 65. Redemption from sale of any tax, lien or assessment shall be made at any time within one year from the date of the certificate of sale, by paying the purchase money and 20 per centum thereon, and all taxes which the purchaser may have paid thereon, in current gold or silver coin of the United States; or within two years of the date of the certificate, by paying the purchase money, with 30 per centum thereon, and all taxes paid by the purchaser, in such gold or silver coin. The real estate of minor heirs who at the time of sale have no guardian or other responsible person to take care of their interests may be redeemed by them in one year after arriving at majority; and the purchaser, if he shall have received a deed, shall reconvey the premises upon payment by the

heirs as required by other redemptions with interest at 10 per centum per annum, after the expiration of two years from the date of the certificate of sale, on the amount required in other cases to redeem.

Section 66. The marshal shall receive the same fees for his services in advertising and selling property under this chapter as is required for the sale of similar property upon execution, except the sale of all property shall be at the city hall door; and he shall receive the same compensation therefor as a constable for like services upon execution; and the city recorder shall receive a fee not to exceed \$1 for all services and entries herein provided for, and including the certificate of redemption, such fee to be paid primarily by the purchaser at such sale, but shall be deemed and treated as part of the purchase price bid therefor.

Section 67. That any purchaser or his successor in interest shall, from and after the delivery to him of the certificate of sale, have the rights to the rents and profits of such property, and such rights may be enforced under general laws of Oregon applicable thereto.

Section 68. Each lot or part of lot abutting a street graded, improved or repaired, shall be liable for the full cost of making the same upon the half of the street in front of and abutting upon it, and may also for a proportionate share of the costs of improving the intersection of two of the streets

bounding the block in which such lot or part of lot is situated, and the Common Council is hereby authorized to make any and all necessary laws to carry this provision into effect; but when the land adjacent to said street shall not have been laid off into lots and blocks, then the costs of improving such street shall be assessed to the owner or owners of the land lying within one hundred and sixty feet of such improved street.

Section 69. The probable cost of improving such intersection shall be assessed against the lots or parts thereof situated in the quarters of the four blocks adjoining such intersection, but only upon or against the lots or parts thereof in the quarters nearest thereto, and in the following proportions: Five-ninths of the cost to the corner lots and four-ninths to the lots or parts of lots inside in equal proportion per foot; and when any tract adjacent to said improvement is not laid off into lots, the proportionate costs of improving such intersection shall be assessed to the owner or owners, in like proportion as above, of such lands as lies within one hundred and sixty feet of such intersection.

Section 70. If upon the completion of any improvements it is found that the sum assessed therefor upon any lot, part of lot or tract is insufficient to defray the expense and cost thereof, the council shall ascertain the deficit and declare the same by ordinance; and when so declared, the recorder

shall enter the sum of the deficit in the docket of city liens in column reserved for that purpose in the original entry, with the date thereof, and such deficit shall thereafter be a lien upon such lot and other property in like manner and with like effect as in the case of the sum originally assessed, and shall be collected in the same way.

Section 71. Upon the completion of any improvement, if it is found that the sum assessed therefor upon any property is more than sufficient to pay the cost thereof, the council shall ascertain and apportion the surplus in like manner as in the case of a deficit; and, when so ascertained and declared, it shall be entered as in the case of a deficit in the docket of city liens; and thereafter the person who paid such surplus or his local representative or assign, is entitled to repayment of the same by warrant on the treasurer.

Section 72. All money collected upon assessments for the improvement of streets and alleys shall be kept as a separate fund, and in no case shall it be used for any other purpose whatever.

Section 73. Whenever any property sold under this or the preceding chapter shall bring more than the tax or assessment thereon, with costs and charges of collection, the surplus must be paid to the treasurer; and the person executing the warrant shall take a separate receipt for such surplus and file it with the recorder on the return of the warrant; and at any time thereafter the owner of

said property, or his legal representative, is entitled to a warrant on the treasurer for the amount of such surplus.

Section 74. Whenever the grade of any street has been established, the council may authorize the owner of any property abutting thereon or adjacent thereto, to cut down or fill up said street in front of such property according to the established grade, at the expense and cost of such owners and under such terms and conditions as the council may determine upon.

The City of Hood River took proceedings to comply with and did comply with said provisions of its charter, which were introduced in evidence.

The above statement of facts has been prepared by appellants in accordance with the ruling of the court made upon the objections of respondents to the first statement of facts prepared by appellants, and is approved after notice and hearing of respondents, this 28th day of June, 1917.

R. S. BEAN,
Judge.

And afterwards, to wit, on the 23d day of May, 1917, there was duly filed in said court and cause, praecipe for transcript of record for appellants, in words and figures as follows, to wit:

PRAECIPE FOR TRANSCRIPT.

To G. H. MARSH, clerk of the United States District Court, District of Oregon:

Please prepare and certify transcript of record in the above entitled cause, upon the appeal of the above named defendants, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and include in said transcript the following papers, pleadings and proceedings from the record in said cause, to wit:

Decree of infringement and for accounting dated April 27, 1914.

Order withdrawing appeal and referring to master in chancery dated March 27, 1916.

Affidavit of Charles H. Carey of April 26, 1916.

Subpoena served the Reliance Construction Company and National Surety Company, and proof of service. Subpoena issued April 26, 1916, served one on April 26, 1917, and one on April 27, 1916, and filed with proof of service Aug. 18, 1916.

Findings of fact made by the master in chancery filed Aug. 18, 1916.

Master's reasons for findings of fact filed Aug. 18, 1916.

Exception of the Reliance Construction Company to master's report filed Sept. 15, 1916.

Motion of complainants for confirmation of master's report filed Sept. 15, 1916.

Order made by the court on the hearing Jan. 19, 1917.

Order court made Jan. 29, 1917, and filed opinion, including copies of the opinion of the court.

Final decree or judgment order dated Feb. 3, 1917.

Petition of Reliance Construction Company for rehearing filed Feb. 3, 1917.

Order of Feb. 12, 1917, hearing petition for rehearing.

Order of Feb. 19, 1917, denying petition for rehearing.

Opinion filed Feb. 19, 1917, on rehearing.

Petition for appeal Reliance Construction Company.

Petition for appeal City of Hood River.

Petition for appeal National Surety Company.

Assignments of errors Reliance Construction Company.

Assignments of errors City of Hood River.

Assignments of errors National Surety Company.

Bond on appeal Reliance Construction Company.

Bond on appeal City of Hood River.

Bond on Appeal National Surety Company.

Citation issued on appeal of Reliance Construction Company proof of service.

Citation on appeal issued in behalf of City of Hood River proof of service.

Citation issued on behalf of National Surety Company and proof of service.

Statement of facts as settled by the court.

Stipulations and orders extending time to file praecipe.

Statement of facts and transcript of the Court of Appeals, Ninth Circuit. Said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for Ninth Circuit.

RALPH R. DUNIWAY,
Solicitors for Appellants, Reliance Construction
Company, City of Hood River, and National
Surety Company.

Due and legal service of the within praecipe for transcript is hereby accepted in Multnomah County, Oregon, this 22d day of May, 1917, by the receiving of a copy thereof, duly certified to as such by Ralph R. Duniway, attorney for appellants.

CAREY & KERR,
Attorneys for Appellees.

Filed May 23, 1917.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 29th day of May, 1917, there was duly filed in said court and cause praecipe for additional portions of record in transcript, in words and figures as follows, to wit:

PRAECIPE FOR ADDITIONAL PORTIONS OF
RECORD IN TRANSCRIPT.

To G. H. MARSH, clerk of the United States District Court for the District of Oregon:

In addition to the papers, pleadings and proceedings from the record in the above cause to be included in the transcript of record on the request of the appellants, the respondents and appellees hereby notify you that the following are also desired:

Stipulation made March 30, 1914, in open court showing use of printed record for hearing in the above cause and case of *Hassam Paving Company et al v. Consolidated Contract Company, et al*, No. 3818 (Judgment Roll No. 6150).

Stipulation filed June 2, 1914, for hearing cases on appeal on one transcript.

Stipulation filed June 24, 1914, enlarging time as aforesaid to July 24, 1914.

Order on same dated June 24, 1914.

Order for hearing both cases on one transcript filed June 24, 1914.

Order dated June 24, 1914, extending time thirty days in which to file transcript.

Order dated July 22, 1914, enlarging time to file praecipe.

Stipulation dated July 22, 1914, enlarging time to file praecipe to August 24, 1914.

Stipulation dated July 22, 1914, enlarging time.

Order dated July 22, 1914, enlarging time.

Order dated August 24, 1914, enlarging time to file praecipe to August 29, 1914.

Stipulation filed August 24, 1914, enlarging time to file praecipe.

Stipulation filed August 24, 1914, enlarging time to file transcript.

Order dated August 24, 1914, enlarging time to file transcript.

Stipulation filed August 29, 1914, enlarging time to file praecipe.

Order made August 29, 1914, enlarging time to file praecipe.

Stipulation dated August 29, 1914, enlarging time to file transcript.

Notice filed September 4, 1914, that transcript has been lodged in the clerk's office for approval.

Praecipe filed September 4, 1914.

All of the foregoing being in the record of case No. 3818 (Judgment Roll No. 6150), but referred to in the judgment roll of case No. 5966.

Also the following in case No. 5966:

Complaint filed May 1, 1913.

Joint answer of all defendants filed May 23, 1913.

Order on final hearing dated March 31, 1914.

Petition for appeal filed May 21, 1914.

Assignments of error filed May 21, 1914.

Order allowing appeal dated May 21, 1914.

Bond on appeal filed May 27, 1914.

Stipulation filed September 26, 1914.

Stipulation filed March 28, 1914.

Stipulation filed March 27, 1916.

Affidavit of J. H. Crane, June 5, 1916.

Order dated June 5, 1916.

Stipulation attached to the deposition of E. O. Hall filed June 27, 1916.

Dated Portland, Oregon, May 29, 1917.

CAREY & KERR,
Solicitors for Respondents and Appellees.

Due service of the within praecipe for additional portions of the record in transcript, is hereby accepted in Multnomah County, Oregon, this 29th day of May, 1917, by receiving a copy thereof duly certified to as such by C. H. Carey, of attorneys for complainants.

RALPH R. DUNIWAY,
Attorney for Defendants.

Filed May 29, 1917.

G. H. MARSH, Clerk.